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THE *RATIO* OF THE *RATIO DECIDENDI*

I. *Stare Decisis* AND THE PROCESS OF CHANGE

POOR, indeed, must be the common lawyer who has not paused to ask, with Lord Wright, how the "perpetual process of change" in the body of common law "can be reconciled with the principle of authority and the rule of *stare decisis*?" Beneath the dry and niggling distinctions, the flat frustrating contradictions, behind the bold dynamic precept suddenly emasculated or the mouldering precedent revivified by a new constellation of facts, behind the wavering alternations of judicial caution and judicial valour, coyness and courage, the lawyer of imaginative intelligence must be conscious of the elements of a perennial mystery. He is challenged to ask what magic at the heart of the system of *stare decisis* can transform a symbol of immobility into a vehicle of change? And the challenge confronts him in the dimension both of space and time. In the dimension of space the English common law continues to spread, independently of the powers of political sovereignty, over substantial parts of the globe, and, even amidst the uncertainties of our age, its place as a major legal heritage of all mankind seems assured. In the dimension of time this *corpus juris* already approaches its second millennium of traceable history as a living system of law.

It remains a common assumption among most of us, even today, that the present common law is somehow still one with that common law whose origins we trace back into the early centuries of the modern world. We think of it as a single system of law, somehow linked into unity throughout time. And it is perhaps in this assumed link that we should look for the deepest seat of mystery. Formerly, and sometimes even today, we have tended to take for granted that the link is in whole or in part that of logical derivation. Certain fundamental principles were always there: for new problems we have had to draw out what was already implied in these fundamental principles. To decide the instant case, we have to make a specific application of these fundamental principles; and by

the same token the rule now newly applied is deemed, *in posse* if not *in esse*, to be a rule of the same common law and coeval with it. We assume (though there may also be other reasons for this) that judicially developed norms applied in a particular case have always been the law. This rule, at the least, symbolises the common assumption (spoken or tacit) that all present and future developments in common law principles are somehow already implicit in the common law existing hitherto.

The intelligent citizen, and certainly the intelligent lawyer, must at some stage formulate a position on some aspects of these matters. How is it possible that, over large segments of human relations, a single body of common law has maintained its position as a means of sound ordering in a mid-twentieth-century world of approaching automation, of ever more rapid movement, and massing of urban populations, as it formerly did in the vastly different conditions of ancient agricultural, pastoral and petty industrial society? By what magic could the common law have developed out its own inner resources from its former to its present scope and functions? What can be the link which allows us to think of these vastly differing modes of adjustment as but phases of a single system of law? What can be the secret of the remarkable capacity for growth and adaptation which has allowed a body of principles and its assumed implications to perform at such a tolerable level of efficiency both in primitive, petty feudal, rural and in great modern urban civilisations? These may seem rather general and even melodramatic questions to ask in a prologue to a technical inquiry about the *ratio decidendi* of a case. But they are essential to be asked if we are to understand the full import of the technical questions, against the vast exciting framework of which they are a part.

The doctrine of *stare decisis*, in addition to whatever it may enjoin upon the intellect, certainly evokes an atmosphere and a mood to abide by ancient decisions, to follow the old ways, and conform to existing precedents. It suggests a condition of rest, even of stasis, a system of law whose content is more or less settled, the past content by past decisions, and the present and future content because they too are controlled by those past decisions. It implies the stability of the legal system along the stream of time, that despite all the vast social, economic and technological changes of the last eight or nine hundred years, society remains nevertheless in some meaningful sense under the governance of the same system of law.

Nor is the drama of these questions exhausted even then. For with this same inner mystery of the common law there are probably also entangled some subsidiary mysteries of "the rule of law" as this notion has arisen in the common law world, and offers itself for adoption elsewhere. As a political concept "the rule of law" has, as at least one main strand, the minimisation if not the exclusion

of human arbitrariness from the processes of law and government. And if we are to take seriously the atmosphere and mood which surround the notion of *stare decisis*, if past decisions yielded precepts of ready-to-be-known content, if present and future decisions were already implicit in past ones, then indeed human arbitrariness would be at a minimum. The assumed emergence of new decisions from those of the past would depend only on correct judicial reasoning and not on judicial choice and will. And the notion of *stare decisis* would thus run into the notion of " the rule of law," as in Bracton's famous subjection of the King not to man but to God and the law. If we could wholly accept the idea that present and future decisions are determinable and determined on the basis of *stare decisis* then indeed we would finally have attained the dream of being under a government of laws and not of men.

II. The *Ratio Decidendi* as the Link Between Generations

In a system of law which lives by *stare decisis* the precise identification and delimitation of the *decisum* is the deepest secret of juristic life. Whatever the other meanings of the *ratio decidendi* of a case they must include whatever is meant by that identified and delimited *decisum* to which *stare decisis* requires us to adhere. But its historical meaning is no less vivid. In the stream of time in which the common law is assumed to unfold from its own pre-existing resources to govern a changeful society, the *ratio decidendi* would be the indispensable organic link between generations both of men and of emerging legal precepts. It would be this *ratio* which, as it were, legitimises new precepts as being indeed the offspring of those patriarchal fundamental principles of the common law which unify it by their pristine origins.

If *stare decisis* seems to import a mood of resting on the old ways, of stability and even stasis in the legal materials, then history compels us to observe that this apparent mood overlays a process of constant and often dynamic change. And if such contradictions are to be understood, it must be in the nature of the *ratio decidendi* that we must seek some main clues. For it is the use of this notion through which new decisions can be made in the comfort and respectability of a proper social relation, and in a manner legitimising the fruits of decision. Here, if anywhere, is the operating concept allowing courts which base themselves on *stare decisis* to do their day-to-day job of deciding new cases sensibly, even while purporting to adhere to the older rules.

No one, therefore, need apologise for adding an article on this subject to those of Professors Goodhart and Montrose, and Mr. Simpson.[1] And, by the same token, the subject is far too grave

[1] See recently J. L. Montrose, " *Ratio Decidendi* and the House of Lords " (1957) 20 M.L.R. 124–130; A. W. B. Simpson, " The *Ratio Decidendi* of a

and momentous to justify neglect of such developments of thought in this area as the last two or three decades have produced. It is naturally gratifying that each of the contributors has felt it necessary to argue that, on some point or other, this writer's position as to the *ratio decidendi* supported, or was not inconsistent with, his own. This present article, however, is not designed to defend or even explain the present writer's position. The design is rather to see if there can be found, from the present vantage point of debate, any basic distinctions to help in the more fruitful exploration of this holy of holies of the world of *stare decisis*. It will be all the better if any such distinction helps to resolve some of the cross-purposes figuring in the debate hitherto; but that, in the present design, would be but collateral to the main purpose.

III. The Term "*Ratio Decidendi*": Distinction Between Descriptive and Prescriptive Senses

Should we not, in the first place, try scrupulously to respect the distinction between that use of the term *ratio decidendi* which describes the process of reasoning by which decision was reached (the "descriptive" *ratio decidendi*), and that which identifies and delimits *the* reasoning which a later court is bound to follow (the "prescriptive" or "binding" *ratio decidendi*)?

Descriptively the phrase imports merely an explanation of the court's reasoning to its conclusion, based on sociological, historical and even psychological inquiry. The finding from such an inquiry is true or untrue *as a matter of fact*; it could not be refuted merely by showing that logically the same decision could have been reached by different reasoning, or by showing that *as a matter of law* the actual reasoning was fallacious, unpersuasive or even downright improper and impermissible. This descriptive *ratio decidendi* may, of course, itself be sought at various levels; it may for instance be limited to the level of verbal behaviour of the judge, or it may seek to embrace the level of his total behaviour.[2] Prescriptively used, on the other hand, the phrase *ratio decidendi* refers to a

Case" (1957) 20 *ibid.*, 413–415; and under similar titles respectively, J. L. Montrose, A. W. B. Simpson, and A. L. Goodhart, in (1957) 20 M.L.R. 587–595, (1958) 21 M.L.R. 155–160, (1959) 22 M.L.R. 117–124. See further, Simpson in (1959) 22 M.L.R. 453–457.

[2] To avoid further complicating issues already too complex, and in order to give Professor Goodhart's theory its most favourable ground, I have consciously limited the later remarks here on the descriptive *ratio decidendi* to the former level, to motives of decision express or implicit through verbal behaviour, as distinct from the actual psychological motivation leading the court to decision. Cases may, of course, occur in which the reasons express or implicit in the court's judgment do not correspond with the actual motivations. Many American realists in their time proposed not only that description should normally proceed at the deeper level, but that increased knowledge of this level was so important and neglected that all efforts should be concentrated on it, and the search for the prescriptive *ratio decidendi* if necessary abandoned, or at least suspended.

normative judgment requiring us to choose a particular *ratio decidendi* as legally required to be drawn from the prior case, that is, as the binding *ratio decidendi*.

The relation between the ambits of the descriptive and prescriptive *rationes* is normally at least one of overlapping. The degree of overlapping, and how near it may approach coincidence, depend, *inter alia*, on which of the competing methods of discovering the prescriptive *ratio decidendi* is assumed to be correct.[3] The range of the prescriptive *ratio decidendi*, in particular, does not *of necessity* fall within that of the descriptive. For instance, in that version of the prescriptive *ratio* which stresses the proposition of law enunciated by the court as a basis of its holding, the prescriptive *ratio decidendi* would necessarily coincide with or at least be included within, the descriptive.[4] On the other hand, in a version (such as Professor Goodhart's) which rests on the relation between the "material facts" and the holding, and for which the court's enunciated propositions of law are relevant only insofar as they imply a view of what facts are "material," the position is different. Insofar as the later court, looking at the whole report of the precedent case, may select as "material" (in the precedent court's view) facts different from those which could be inferred to be so from that court's enounced propositions of law, the prescriptive *ratio* might turn out to differ from the descriptive.

The present distinction between descriptive and prescriptive *rationes* may clarify the difference between Professor Goodhart,[5] Mr. Simpson,[6] and Professor Montrose,[7] as to whether it can be useful or proper to use the term "*ratio decidendi*" to refer to the original court's actual reasoning in reaching its holding, without reference to the question whether that reasoning is binding in a later case. The present answer to this would be that no harm can come of this, provided that we are careful to indicate by some such adjective as "descriptive" or "actual," that one is not intending by the use of the phrase to say anything about *the binding force* of the reasons. A fuller analysis would then require us to add that this "descriptive" or "actual" *ratio* is, on one version of the prescriptive *ratio decidendi*, deemed to be binding insofar as it is a basis of the actual decision. (Beyond that it remains (also on that version) merely descriptive, or in common parlance *obiter*.)

[3] And, of course, on the level of description which is being attempted. See *supra*, n. 2.

[4] This would be subject to only apparent qualification, for instance, insofar as the legal proposition enunciated is wider than necessary to base the holding on the instant facts.

[5] A. L. Goodhart, "The *Ratio Decidendi* of a Case" (1959) 22 M.L.R. at 121–122.

[6] A. W. B. Simpson, same title (1958) 21 M.L.R. 155–156.

[7] J. L. Montrose, same title (1957) 20 M.L.R. 587–588.

IV. Approaches to the Operation of the "System" of *Stare Decisis*

Related to the distinction between the descriptive *ratio decidendi* and prescriptive *ratio decidendi*, are two approaches to the behaviour of courts as this bears on the problem of the *ratio decidendi*. One approach is that of the observer who seeks to describe and explain *as a matter of fact* how present decisions are related to prior decisions. The other approach seeks to establish from the behaviour of courts themselves, perhaps supplemented by assumed first principles, the limits within which, *as a matter of law*, a prior decision prescribes a binding rule for later decisions. It seeks (to use Professor Goodhart's term) to establish a "system" by which we can test what ground of decision of an earlier case is legally binding on the court in a later case.

That the present writer's account of the working of precedent has been directed essentially to description and explanation is obvious. It is quite explicit from the beginning to the end of the relevant chapter. At the beginning it was asked:

> "What are the features of our system of precedent which can give an appearance of stability and continuity and nevertheless permit constant change to take place, new propositions to be established, old ones discarded in whole or in part, and permit all this to proceed seemingly on the basis of logical deduction from pre-existing premises." [8]

And, at the end of the chapter, it was said that the "main purpose" had been:

> "to display the devices and techniques whereby English judges can live and work by the creative light of (what Holmes had called) 'good sense' (as opposed to logic), even while they render homage to the authoritative premiss and the syllogistic deduction. It was to display how they are able to promote legal flux under the very banner and in the very stronghold of *stare decisis*; how, in Holmes' words, 'knowing too much to sacrifice good sense to the syllogism,' they are able to present the growth of the law as 'logical in form,' even while they make the creative choice before which logic stops short." [9]

Which of these attitudes is adopted by a particular inquiry is generally a matter of taste, or direction of intellectual interest. But it may also involve much more than that. To engage for example on an inquiry concerning *the* method, or even *the best* method, of discovering from the report of a single case what is "THE *ratio decidendi*" of that case, may also be an intellectually impermissible activity, unless at least two assumptions can be made. One of these is that there is normally ONE *ratio decidendi*, AND ONE ONLY, which explains the holding on the facts, and is as

[8] J. Stone, *The Province of Function of Law* (1946), 168.
[9] *Ibid.*, at 206.

such binding. The other is that such a *ratio decidendi*, assumed to exist, can be delimited from examination of the particular case itself. Professor Goodhart's paper of 1931 (originally published 1930),[10] both by its general thesis and by its detailed argument, indulges both of these assumptions. It is, indeed, a model of their indulgence.

V. Acceptability of the Underlying Assumptions of Professor Goodhart's View

It is believed that the assumptions just stated will not bear examination, and the reasons for this belief may here be expanded as follows.

If the *ratio* of a case is deemed to turn on the facts in relation to the holding, and nine facts (a)–(j) are to be found in the report, there may (so far as logical possibilities are concerned) be as many rival *rationes decidendi* as there are possible combinations of distinguishable facts in it. What is more, each of these " facts " is usually itself capable of being stated at various levels of generality, all of which embrace " the fact " in question in the precedent decision, but each of which may yield a different result in the different fact-situation of a later case. The range of " facts " of *Donoghue* v. *Stevenson*, standing alone, might be oversimplified into a list somewhat as follows, each fact being itself stated at alternative levels.

(a) *Fact as to the Agent of Harm.* Dead snails, *or* any snails, *or* any noxious physical foreign body, *or* any noxious foreign element, physical or not, *or* any noxious element.

(b) *Fact as to Vehicle of Harm.* An opaque bottle of ginger beer, *or* an opaque bottle of beverage, *or* any bottle of beverage, *or* any container of commodities for human consumption, *or* any containers of any chattels for human use, *or* any chattel whatsoever, *or* any thing (including land or buildings).

(c) *Fact as to Defendant's Identity.* A manufacturer of goods nationally distributed through dispersed retailers, *or* any manufacturer, *or* any person working on the object for reward, *or* any person working on the object, *or* anyone dealing with the object.

(d) *Fact as to Potential Danger from Vehicle of Harm.* Object likely to become dangerous by negligence, *or* whether or not so.

(e) *Fact as to Injury to Plaintiff.* Physical personal injury, *or* nervous or physical personal injury, *or* any injury.

(f) *Fact as to Plaintiff's Identity.* A Scots widow, *or* a Scots-woman *or* a woman, *or* any adult, *or* any human being, *or* any legal person.

(g) *Fact as to Plaintiff's Relation to Vehicle of Harm.* Donee of purchaser, from retailer who bought directly from the

[10] In (1930) 40 Yale L.J. 161–183.

defendant, *or* the purchaser from such retailer, *or* the purchaser from anyone, *or* any person related to such purchaser or other person, *or* any person into whose hands the object rightfully comes, *or* any person into whose hands it comes at all.

(h) *Fact as to Discoverability of Agent of Harm.* The noxious element being not discoverable by inspection of any intermediate party, *or* not so discoverable without destroying the saleability of the commodity, *or* not so discoverable by any such party who had a duty to inspect, *or* not so discoverable by any such party who could reasonably be expected *by the defendant* to inspect, *or* not discoverable by any such party who could reasonably be expected *by the court or a jury* to inspect.

(j) *Fact as to Time of Litigation.* The facts complained of were litigated in 1932, *or* any time before 1932, *or* after 1932, *or* at any time.

Let us first consider the question of "materiality" *apart from any view on that matter "explicitly" or "implicitly" manifest in the precedent court's opinion.* As to none of these facts (a)–(j), and as to none of the several alternative levels of statement of each of them, could it be said on the basis of the report of *Donoghue* v. *Stevenson* alone that it was on its face not "material" (in the logical sense) to the holding in that case. Even as to the time of litigation, as to which we are most tempted to say that this at least must be "immaterial" on the face of it, we must be careful to avoid a *petitio principii.* Are we really prepared to assert with dogmatism that *Donoghue* v. *Stevenson* should have been, and would in fact have been, so decided in 1800? If not, it follows that *logically, i.e.,* apart from any special indication that should be drawn from the precedent court's own attitude, the "*ratio*" of *Donoghue* v. *Stevenson* did not compel later courts to impose liability in any case where only some of the above possible "material" facts, and some levels of statement of them, were found. And another way of saying this is that (apart still from such special indication) a *ratio decidendi* drawn from a case by the "material facts" method can only be prescriptive or binding for a later case whose facts are "on all fours" *in every respect.* And since the *italicised* words must be taken seriously, this reduces the range of binding *ratio decidendi* to vanishing point. Outside this range, the question always is whether in the later court's view the presence in the instant case of *some* of the facts (a)–(j), at some of their alternative levels or generalised statement, is more relevant to its present decision, than is the absence of *the rest of them.* And this is not a question of the "materiality" of facts to the decision in the precedent case imposing itself on the later court. It is rather a question of the analogical relevance of the prior holding to the later case, requiring the later

court to choose between possibilities presented by the precedent case.[11]

At this point then, before we begin searching for the precedent court's assertion as to which facts and levels of statement of them are "material," it is correct to say that the questions: What single principle does a particular case establish? What is *the ratio decidendi* of this case as at the time of its decision? are strictly nonsensical. It can only be answered by saying that there is no such single principle or *ratio* that can in terms of the "material facts" test be binding in a later case.

Does it then overcome this difficulty to define "materiality" as Professor Goodhart in effect does, in terms of the precedent court's explicit or implicit assertion as to which of facts (a)–(j) are material? Or to insist that the question, What are "material facts" by which we determine the prescriptive *ratio* of a case? is always to be determined *according to the view of the precedent court*, and not according to the view of the later court or observer. (Indeed, in defending his position in 1959 [12] this distinction becomes almost its central bastion.) Yet there will often be the gravest doubt as to what facts the precedent court "explicitly or implicitly" "determined" to be material. There will often be inconsistent indications from what is expressed or implicit, even in a one judge court. Such inconsistencies as between the concurring judgments in appellate courts are notoriously also a constant and fruitful source of legal uncertainty and change. The more important the issue and the instance of appeal the more likely are there to be multiple judgments and therefore multiple versions of the *ratio decidendi* and this by any test. And there are other chronic sources of competing versions and indeterminacies later to be mentioned.

Professor Goodhart recognises some of these difficulties in distinguishing which of facts (a)–(j) are "material," and in particular that this would involve some guesswork on the part of later courts in applying his system. In his latest exposition he urges that they nevertheless do not affect his "system" since they are due to "the subject-matter itself, and not to the system which is applied to it." [13] On the most favourable understanding of this, it appears to mean that the difficulties spring from deficiencies in articulation of the precedent court or in the report, or other characteristics which are of a more or less "accidental" nature. Even to this it would have to be said that the "accident-proneness" in the subject-matter makes the difficulties serious and constant.

Yet these are not the most crucial difficulties with Professor Goodhart's system. The crucial ones arise rather from the several alternative levels of statement of each "material fact" of the

[11] And see *infra*, pp. 617, 618.
[12] (1959) 22 M.L.R. at 123.
[13] *Ibid.*, at 124.

precedent case, ranging from the full unique concreteness of that actual case, through a series of widening generalisations. In this series only the unique concreteness is *firmly* anchored to the precedent court's view that a given Fact A is "material"; and *ex hypothesi* that level of unique concreteness can scarcely figure as a part of the binding *ratio* for other cases. By the same token the reach of the *ratio*, even after each "material fact" seen by the original court is identified, will vary with the level of generalisation at which "the fact" is stated. How then is the "correct" level of statement of Fact A to be ascertained by the later court?

Is this question too to be referred back entirely to the "explicit" or "implicit" view of the precedent court, as to which is the "material" level of statement of each "material" fact? Are we to say that merely because the House in *Donoghue* v. *Stevenson* might have stated the material fact as to the agent and vehicle of harm in terms of bottles of beverage, this concludes one way or another a later case as to cartons of butter, or the wheels of automobiles? Is it reasonable to assume that courts using language appropriate to the case before them do, or could, address themselves in their choice of language to all the levels of generality at which each "material" fact (a)–(j) of the concrete case is capable of statement, not to speak of the possible combinations and variations of these facts, and the implications of all these for as yet unforseen future cases? Yet unless it is reasonable so to say it would reduce judgment in later cases to a kind of lottery (turning on the chance of words used) to say that the later holding is controlled by that level of generalised statement of the assumed "material fact" which is explicit in the precedent court's judgment. And to admit also that level which might be "implicit" in the former judgment would in most cases be merely to impute to the precedent court a choice of levels of generalised statement (and therefore of the reach of the *ratio* in the instant case) which must in reality be made by the instant later court.

If, on the other hand, Professor Goodhart's reference of the question of "materiality" back to the precedent court does not extend to the question, Which level of generalised statement of the "material fact" is determinative of the *ratio*? the *impasse* of his system would become, if possible, even clearer, because more patent. Each "material fact" of a case would then have to be recognised as capable of statement in an often numerous range of more or less generalised versions, the range of the *ratio* varying with each version. Since this is so the extraction of the *ratio decidendi* in the course of later judgment could never have the flavour of discovering the single correct *ratio decidendi* of the earlier case, by merely identifying *nunc pro tunc* the "facts" deemed "material" by the precedent court as at the instant of the precedent decision. And this is quite additional to the difficulties, already mentioned, of so identifying these "material facts."

We here approach the very core of the difference between Professor Goodhart and the present writer concerning "the *ratio decidendi* of a case." However it be as to the interesting ancillary points of debate between Professor Montrose and Mr. Simpson on matters collateral to this writer's position, both of them are agreed (and, it is believed, correctly) on two matters.[14] One is that Professor Goodhart's "system" of discovering the *ratio decidendi* neither *describes* adequately the actual process by which case law is built up, nor can it be the answer to the question, How do we discover "the *ratio decidendi* of a single case"? They are also agreed, and correct in believing, that this writer shares their conclusions on these two matters. If there has been doubt on this it is hoped that the present restatement will dispel it. For this restatement is intended to spell out and supplement the main gist of the treatment in *The Province and Function of Law*. This is, that there is not (despite Professor Goodhart's theory) any one *ratio decidendi* which is necessary to explain a particular decision, and is discoverable from that decision.

VI. Professor Goodhart's Recent Formulation

For, once it is granted that "a material fact" of the precedent case can be stated at various levels of generality, each of which is correct for that case, any of these levels of statement is potentially a "material fact." Insofar as the *ratio decidendi* is determined by each "material fact," then what the precedent case yields must be a number of potentially binding *rationes* competing *inter se* to govern future cases of which the facts may fall within one level of generality, but not within another. An automobile in bad repair can be a noxious physical object, but no one can call it an opaque bottle containing a reputed snail.

That the above submissions are correct can (with respect) also be inferred from Professor Goodhart's latest statement on the matter. He expresses himself, at the very end of his recent article, as in complete agreement with the present writer's view that "further decisions are frequently required" before the scope of "the *ratio decidendi* of a case"[15] is finally determined.[16] The least that this can mean is that the scope of the *ratio decidendi* of the precedent case will "frequently" not be determined or determinable until further decisions have been made; and that it will "frequently" be impossible to draw from "the facts treated by the judge as material and his decision as based on them" a single *ratio decidendi* that will serve as a useful basis for later judgment. If this is so, we must

[14] See esp. A. W. B. Simpson, *op. cit.* (1958) 21 M.L.R. 159–160; J. L. Montrose, in (1957) 20 M.L.R. 587, 593–594.

[15] He actually writes "the scope of a principle." ((1959) 22 M.L.R. 124.) If this is relevant at all, however, at the point of insertion, the words "*a principle*" must be read as equivalent to "the *ratio decidendi* of a case."

[16] *Op. cit.* (1959) 22 M.L.R. 124.

look in a single case not for the one single binding *ratio decidendi*, but rather for a range of alternative *rationes decidendi* competing *inter se* to govern future fact situations; and, as among these, only future decisions will show which is binding. All this involves critical admissions, which (it is ventured to submit) finally contradict Professor Goodhart's steady assumptions that there must be a single *ratio decidendi* of a case, ascertainable from within that case. This self-contradiction can be made fully to appear by the following steps.

First, this need for later decisions to plot the limits of the precedent case arises, in part at least (as just observed), because each "material fact" can be stated at several levels of generality. Second, this means, as has also been seen, that the precedent case *in itself* must yield more than one, and often many, potentially binding *rationes decidendi*, competing to govern future cases. Third, a later court which rejects one of these competing potential *rationes decidendi* of the preceding case, is thereby determining, as at the time of its own decision, which of these competing *rationes* is to be prescriptive for the instant case. Fourth, in terms of Professor Goodhart's system, what the later court is here doing is choosing between the competing versions of "the material facts." For (the holding itself in the precedent case being fixed) variations in the *ratio decidendi* must be attributable to variations in the other main component of Professor Goodhart's system, namely, "the material facts." Fifth, the later court cannot, merely by operating with Professor Goodhart's system, choose between these competing versions of the "material facts." Such choices (he admits) are "frequently required" to determine the scope of the prescriptive *ratio decidendi*. Yet his system requires him to seek only the *precedent court's view* of "the material facts"; and thus, by his present admission, Professor Goodhart has in effect acknowledged that more than one competing view of "the material facts" will "frequently" be available to the later court. It seems to follow that the assumption on which his system is based, that each case has within itself a single *ratio decidendi* ascertainable *in terms of the precedent court's view of "the material facts"* together with its holding, is denied by this very admission. Sixth, insofar as the multiplicity of possible competing versions of "the material facts" seems characteristic of most appellate cases, the difficulty thus revealed is not, as Professor Goodhart would have us believe,[17] an accident arising from "the subject-matter" of "some precedents"; it is rather a difficulty and (with respect) a fatal difficulty for his "system" itself.[18]

He himself now courageously concedes that his "system" involves its operator in some "guesswork," and he seeks to soften this by saying that there is always some "guesswork" in "legal interpretation," and that "this is what makes the law so interesting." But

[17] *Ibid.*

[18] *Ibid.*

it has to be observed that since the sources of these uncertainties are (as has now been shown) central, and not merely marginal, to " the subject-matter," the " guesswork " of which he speaks also becomes rather central in the operation of his " system." [19] And (as has also been shown) the area of indeterminacy arising from this guesswork is as wide as the uncertainties affecting identification of each " material fact," when multiplied by those affecting the level of statement at which each " fact " is deemed to be " material."

In all these circumstances it becomes a matter for serious consideration how much more intellectual energy should be devoted to juristic effort to discover the " correct " mode of ascertaining " the *ratio decidendi* of a particular case " by examining the case itself; for *ex hypothesi* there is no such unique *ratio*. It was this reason, and no disrespect for a colleague's views, which led the present writer to deal only in a footnote with Professor Goodhart's own method and rules for discovering " the *ratio decidendi* of a case." For insofar as these proceeded on the above mistaken assumptions, they could be no more persuasive (however distinguished and learned their author) than any other proposal so proceeding; and that is not at all persuasive. And it was precisely at the point in the text at which these assumptions were questioned, that his work was footnoted. The reference in the note to the fact that Professor Goodhart could not claim that he was purporting to describe " the actual uniform operation of English courts," was merely ancillary to the main point in the text.[20]

This brings us to that learned writer's suggestion that this last point would undermine not only his position but the present writer's also. " Since," he says, " there is no actual *uniform* [21] operation of English courts concerning the application of precedents it would seem to follow that all theories on this point, including those expressed by Professor Stone, must be invalid." [22] Such poignancy as this observation might otherwise have had, ceases as soon as the quoted words are replaced in their context, and as the distinction is recalled between inquiries, on the one hand, seeking to describe and explain how present decisions are as a matter of fact related to past decisions, and those, on the other, which seek the correct method of ascertaining " the *ratio decidendi* of a case," *i.e.*, the one prescriptive or binding *ratio*. It was the illusory nature of the latter inquiries, arising from the erroneous assumptions on which they proceed, which led the

[19] It does not, therefore, represent a possible accommodation between our views for him to admit merely " that some precedents will always remain indeterminate." ((1959) 22 M.L.R. 124.) As a reply to my own conclusion (on the reasoning now again here developed) that his " rules for determining the material facts " would still leave " the *ratio* in many, if not most appellate cases, a matter for variable judgment," it does not really join issue to admit that " some " precedents will always remain indeterminate.

[20] J. Stone, *op. cit.*, 187–188, esp. 187, text lines 1–15 *et seq.* and footnote 219.

[21] His italics.

[22] *Op. cit.* (1959) 22 M.L.R. 124.

present writer to relegate even the most famous example of them to a footnote. It was with the former, the sociological, type of inquiries that the present writer's own work was concerned. And since such inquiries do not proceed on the assumptions in question there seems no reason why they should share this illusory character. It is moreover certainly not necessary, in trying to *describe* or *explain* the phenomena of judicial precedent, to assume any degree of uniformity in the relevant judicial behaviour; here, indeed, is where the lack of uniformity itself may only make the attempt at description more fascinating and fruitful.

It is the more important to stress the distinction between these two kinds of inquiries, since Professor Goodhart continues to insist, even in 1959, that his earlier essay provides " a guide to the method which . . . most English courts follow when attempting to determine the *ratio decidendi* of a doubtful case." Here again, still, there seems to be the unquestioning assumption that there must necessarily be only one correct *ratio decidendi*,[23] and one discoverable within the four corners of the particular case. He is at pains to stress, indeed, even more than he had done twenty-eight years before, that this *ratio* depends on " the material facts as seen " expressly or implicitly, by the judge or judges in the precedent case, and not on discriminations between material and other facts made by later courts in fixing the *ratio decidendi*.[24] He thus redoubles the dependence of his position on the challenged assumptions. Professor Goodhart may conceivably be able to show that that challenge was itself baseless; it would be a great service if he would squarely address himself to this task.

VII. Judicial Choices and the Ratio of the Ratio

It seems appropriate at this point to place the areas within which the exercise of judicial choice is compelled by the indeterminate nature of the *ratio decidendi*, along with other areas of such required judicial choice. Such a stocktaking, as it were, of the bearing of modern juristic thought on " the rule of *stare decisis*," may afford some at least of the answer to Lord Wright's question how the " perpetual process of change " in the common law (and above all its movement on appellate levels) is to be reconciled with " the rule of *stare decisis*." The main areas of judicial choice listed below, which thus call for recognition, will quickly be seen to occupy a number of the principal " control centres " in the operation of a system of precedent. A brief summation of each follows.

(a) Choices Unavoidably Arising from the Nature of Terms Used in Substantive Rules, or from Interrelations of Rules.

[23] *Ibid.*, at 118, where he says that even where there are many judgments in an appellate case, " each case must contain a principle which is binding in future cases." And *cf. ibid.*, 121 (two places).

[24] *Ibid.*, 119, 121, 123.

(b) Choices Unavoidably Arising from Competing Methods of Seeking "the *Ratio Decidendi* of a Case."

(c) Choices Unavoidably Arising from the Competing Versions of the *Ratio Decidendi* of a Particular Case, when the "Material Facts" Method is Applied even to a Single Judge Decision.

(d) Additional Choices Arising from the Competing Versions of the *Ratio Decidendi* of a Particular Case (by any Test) when Several Judgments are Given.

(e) The Multiplication of Available Choices Arising from the Interplay of the Above.

A. *Choices unavoidably arising from the terms used in substantive rules and their interrelations: categories of illusory reference*

The common law is at least as rich as any other in the use of terms which leave open for the court a substantial choice as to the result to be reached in a particular case. Some years ago it was sought to identify and illustrate the main kinds of categories, whether consisting of supposed distinctions, or of particular terms used in rules, principles, standards or conceptions, which allow freedom of choice to courts despite seeming to require a particular result to be reached. One is the category of meaningless reference, of which most examples resolve themselves into the legal distinction without the factual difference. Though the court may seem to treat such a legal distinction as determinative of the case, its decision can still obviously not be determined by it. Another is the category of concealed multiple reference, where a single verbal term represents a number of different though related legal notions, each with a different set of legal consequences, and where the courts, operating under the appearance of a single rule, can still exercise freedom to reach the results they think appropriate by shifting from one legal notion to the other.

Even more ubiquitous and important, throughout the legal system and its operation, are the legal categories of competing reference, and the single category with competing versions of reference. No source of litigation on matters of law is more central on the appellate level than the availability of alternative starting points for logical arguments, both of which converge in their conclusions on the instant facts, to make available opposite conclusions. When this occurs, apart from questions of hierarchy of authority, the court is not only free to choose between the alternatives unembarrassed by legal compulsion; it is obliged to do so. Nor is even the circuitous argument without its importance in a going system of law, though the legal category of circuitous reference (as might be expected from the sophistication of lawyers) usually has its circuity concealed. Some theories of quasi-contractual recovery and of frustration of contract, which have had their influence, are examples. Nor should

it be necessary at this stage to do more than recall the wide ramifications, throughout the common law, of categories of indeterminate reference, such as that of reasonableness or fairness, in allowing courts to reach variable conclusions in the particular case, within a wide range of legal possibilities. This type of legal category is particularly illuminating since its effect is openly to invite the court to inject into the living body of the older law insights arising from the court's knowledge of contemporary social relations and the contemporary environment. But the fact that the invitation is here openly given, should not prevent us from seeing that this injection also takes place within the areas of required judicial choice which the other types of illusory reference also provide.[25]

B. *Choices unavoidably arising from competing methods of ascertaining the supposed ratio decidendi of a case*

It may be, as Professor Goodhart has again argued so earnestly, that his own purported method for finding the *ratio decidendi*, namely "to find the material facts as seen by the judge and his conclusion based on them,"[26] may often yield different results from other methods (variously described) which focus on "the reasons given for decisions" by judges, or on the rule of law "enunciated" by the court.[27] Indeed, it seems to have been a main point of his original article,[28] as well as of the issue he has currently taken with Mr. Simpson, that the different tests may well yield different *rationes* and therefore opposed results in later cases.

Insofar as this main point was accepted,[29] we would then be

[25] See, for fuller treatment, J. Stone, *The Province and Function of Law* (1946), c. 7. For an attempt to represent the logical structure of the fallacies of legal reasoning, discussed in that chapter, by use of symbolic logic, see I. Tammelo, "Sketch for a Symbolic Juristic Logic" (1956) 8 *Journal of Legal Education*, 277, at 300–302. See also U. Klug, *Juristische Logik* (2nd ed., 1958), 144.

[26] *Ibid.*, at 119.

[27] *Ibid.*, at 118.

[28] Repr. in *Essays in Jurisprudence and the Common Law* (1931), 1–26.

[29] Mr. Simpson points out that the court's application of the enunciated proposition of law in the instant case implies a holding as to what are "the material facts," and thus amounts in the end to the same test as Professor Goodhart's. If the latter be taken on its own claims, *i.e.*, as yielding one single *ratio* from within the precedent case, Professor Goodhart might perhaps seem correct in insisting that "the material facts" as he would find them in the report as a whole, may not be the same as might be drawn from the court's application of the enunciated proposition of law. This would arise, in the present view, because of the different available levels of statement of each particular "material fact," because the notion "fact" itself is a notion of multiple versions. (See *supra*, pp. 603–604.) Merely because the precedent enunciated proposition of law referred to snails in bottles would not prevent a later court, operating on the "material facts" test, from holding that the "material fact" did not concern snails or bottles as such, but only as examples of a wider range of noxious agents and vehicles embracing these.

Yet, since the multiple versions of each "fact" arising from different levels of statement also prevent Professor Goodhart's test from yielding any single *ratio* (see *supra*, pp. 605–606), this clarification seems also to boomerang on Professor Goodhart's own positions, leaving the particular controversy rather in the air.

confronted with the indubitable fact that British courts continue, more than a generation after the " correct method " was presented to them, to use also, more or less cogently, the other " methods " which are liable to produce other results. It was indeed precisely the neglect even of any attempt to apply the Professor Goodhart's " material facts " test by the Court of Appeal of Northern Ireland [30] in relation to the House of Lords case of *Geo. Wimpey & Co., Ltd.* v. *B.O.A.C.*,[31] that led Professor Montrose to write the stimulating article which initiated the present exchanges. Whatever weight be attached to Professor Goodhart's view that " most English courts " follow " the method " to which he is seeking to give a " guide," it seems clear both that judicial practice does not consistently do so, and that no rule of law compels them to do so. It follows that insofar as different methods are thought to be capable of yielding different *rationes*, there is here one constantly important source of judicial choices at the very heart of the notion of *stare decisis*. And this would be additional to the choices which (in the present view) necessarily and in any case arises from the competing versions of " the material facts " of any particular case, considered under the next head.

C. *Choices unavoidably arising from the competing versions of the ratio decidendi of a particular case*

Additional to the areas of choice just examined, and even more important, are those which arise for any court which may seriously attempt to rely wholly on Professor Goodhart's test of " the material facts as seen by the judge and his conclusion based on them," in seeking the *ratio decidendi* of a previous case. It but rarely if ever occurs that the previous decision has explicitly stated: " Out of the facts (a)–(j) appearing in this case the material facts as I see them solely basing my conclusion are A, B and C." Yet unless it does this (at least in effect) there is no logically valid method whereby a later court, looking only at that single case, can decide with certainty that the facts A, B and C are " material," while facts D–J are not. For, in mere logic (as has been seen) it is possible to draw as many general propositions from a given decision as there are possible combinations of distinguishable facts in it. But merely looking at the facts it is impossible *logically* to say which are to be taken as the basis for the *ratio decidendi*. The question—What single principle does a particular case establish? has for these reasons been said (and correctly so) to be " strictly nonsensical, that is, inherently incapable of being answered." [32]

Moreover, as has also been seen, the *ratio decidendi* to be drawn by the later court on this " material facts " test would have still a

[30] In *Walsh* v. *Curry* [1955] N.I. 112.

[31] [1955] A.C. 169.

[32] *Cf. The Province and Function of Law* (1946), 187.

greater number of competing versions, by virtue of the truth that each "fact" itself can be stated at different levels of generality, ranging from a supposed "snail in an opaque bottle" to "a noxious agent." The guesswork component involved in most cases in separating out the "material" from the other facts, would be vastly compounded by further guesswork concerning each of the facts guessed to be "material." I mean by "further guesswork," guesswork as to the *level of generality at which each of these facts was "material."* For many such levels of statement will equally embrace the fact appearing in the report; but the breadth of the *ratio decidendi* would have to be dependent on the level of generality of meaning which the later court thinks the precedent court "explicitly or implicitly" had its eye on.[33]

D. *Choices unavoidably arising from multiplicity of judgments in many appellate cases*

The articles of Professors Paton and Sawer,[34] and more recently of Professor Montrose,[35] have well stressed the problematical impact of the role of concurring or dissenting judgments on any simple theory of how to discover "the *ratio decidendi* of a case." It may still be important to bring out again the fuller context of these important contributions. The duties of later judicial choice here arising are a special and most important area of the operation of the single legal category ("the assumed *ratio decidendi* of the case") with several, and possibly numerous, competing versions, none of them authoritative, all of them more or less persuasive.

What is so important to observe is that the *ratio* with the several competing versions, far from being marginal in the system of *stare decisis*, is one of its main products. The structure and *modus operandi* of our courts, especially at the appellate level where points of law which are under stress come to be reviewed, seem to be geared so as to increase the range of competing versions available in rough proportion to the importance of the point of law. The large discretion left to a single judge for discussion of his reasons, and for *obiter dicta*, the separate opinions habitually given by the members of appellate courts and of the House of Lords, whether concurring or dissenting, may all be productive of numerous versions of the legal category under examination. Even where all the decisions concur for the instant facts, the differing versions are liable to be brought into bitter competition by the slightly different state of facts of a future case. It is essentially from this feature of House of Lords decisions that there derives its wide freedom of action, despite the rule that it is bound by its prior decisions. For since

[33] See *supra*, pp. 603 *et seq.*, for fuller demonstration of these positions.
[34] G. W. Paton and G. Sawer, "*Ratio Decidendi* and *Obiter Dictum*" (1947) 63 L.Q.R. 461.
[35] J. L. Montrose, "*Ratio Decidendi* and the House of Lords" (1957) 20 M.L.R. 124.

no sanctity attaches to one set of concurring reasons as against another, one may be preferred to another, or even used merely to neutralise it, leaving the field clear. This technique of distinguishing is often regarded as in the nature of an evasion of the system of precedent. It is respectfully submitted that, on the contrary, it affords a deep insight into its essential nature. "Competing versions" of a legal category are a normal feature of the authoritative materials; and wherever they exist, a set of facts will sooner or later arise which stands between the competing versions, and can only be dealt with by a fresh creative decision. The system of separate speeches merely sets this aspect into relief.[36]

E. *The vast further multiplication of available choices arising from the interplay of the above*

Each area of required judicial choice arising in the above several ways imports room for action of a later court uncoerced by a supposed single *ratio decidendi* of the earlier case. Each such area may later present itself in a particular case. And while all of them may not necessarily be present in every important appellate case, more than one of them may be, and indeed, often are, present together. When this occurs the effect of the interaction of the two areas will be to increase the area of judicial choice, not merely in arithmetical but in geometrical proportions, by dint of the range of combinations and variations of the series of choices available in each area.

The duty of choice in the interpretation of a precedent containing in its language a "category of illusory reference" (as above described) will be further expanded if later courts resort to competing versions of the method of determining its *ratio*. And even if later courts all choose one method of determining its *ratio*, the choices might still be greatly expanded because the later courts, despite their similarity of method, still reach (as we have seen they may) competing versions of the *ratio decidendi* of that particular precedent. And, of course, there will often be superadded to such situations, especially where the precedent is a leading case decided at a high appellate level, the range of choices and of further combinations and variations of them, arising from varied rules "enunciated," or "material facts" explicitly or implicitly found, as a basis of the respective decisions in a multiplicity of appellate judgments in the single case.

VIII. Duty of Judicial Choice-Making as Inherent in the Rule of *Stare Decisis*

This article has emphasised the choices usually available at the appellate level as a steady normal product, rather than a rare and abnormal one, of the operation of the rule of *stare decisis*. It is

[36] *Cf. The Province and Function of Law* (1946), 179–181.

necessary, in closing, also to stress that to assert the availability of judicial choices is not the same as to assert judicial arbitrariness in decision, or even judicial "legislative power" in the sense in which we attribute this to the legislature. The effect of the exercise of the judicial duty to choose is, of course, to produce new law and control and guide its growth; in this sense it may be called "creative" or even "legislative." But unlike that of the parliamentary legislator, the judicial choice is usually between alternative decisions and modes of reaching them presented to the judge by the authoritative materials of the law. These materials do, of course, include areas of settled rules which it would require parliamentary action to overcome. But they also present (especially at the appellate level) guide posts to alternative solutions which remain legally open, beyond the settled areas. In these senses the required judicial choice-making here under discussion, creative as it is, is still (in Cardozo's famous phrases) confined from molar to molecular motions, and is "interstitial" in character.

Yet we must be careful not to assume from such metaphors that the area of movement is unimportant, or (still less) that its size is somehow always diminishing by the accumulation of past decisions. For the universe of problems raised for judicial choices at the growing points of law is an expanding universe. The area brought under control by the accumulation of past judicial choices is, of course, large; but that does not prevent the area newly presented for still further choices by the changing social, economic and technological conditions from being also considerable. And it has always to be remembered that many occasions for choice arise by the mere fact that no generation looks out on the world quite from the same vantage point as its predecessor, nor for that matter with the same eyes. A different vantage point, and different eyes, often reveal the need for choice-making where formerly no alternative, and perhaps not even any problem, were perceived at all. The massiveness of the areas for judicial choice at a particular time, in other words, is a function not only of the accumulation of past decisions, not only of changes in the environment, but also of new insights and perspectives both on old problems, and on the new problems thrown up by these changes or otherwise entering the cultural and spiritual heritage. And one essential point is that, whatever the area, the rule of *stare decisis* not only imposes on judges these constant duties of choice, but also requires them in choosing to give scrupulous heed to the alternative paths presented by the authoritative legal materials, including especially past decisions. Another is that the present thesis does not assert that judges *ought* to assume, in defiance of the rule of *stare decisis*, any new *right* to make choices. It is rather that in many areas the only authoritative guides consist, even as things are, only of a series of alternatives among which, by the system of *stare decisis* itself, they have in any case an inescapable duty to choose.

It is precisely in the above sense that the rule of *stare decisis* has played and will continue to play a great role in common law judicial achievement. Precedents present, for the instant case, a rapid review of social contexts comparable to the present, and of results thought to be apt in those contexts by other minds after careful inquiry. They also point to the available paths of reasoning by which one result or another can be, or has been reached. Moreover, it remains consistent with the present view that even appellate courts do in fact follow precedents, do " draw " *rationes decidendi* from cases and decide subsequent cases " in accordance with " these. They even do so, often enough, by characterising some " facts " (at some levels of generality of statement) in the prior case as the " material " or " important " ones, and others as not such. What has been here urged is that both in logic and in law other alternative *rationes* based on alternative characterisations were also usually available for choice, though in the particular cases not chosen. The point of interest then shifts to the elements of technique, skill, experience and plain wisdom, with which such choices are made when they do present themselves. Here, it is believed, is the heart of the secret by which Lord Wright's paradox is eased, by which " the rule of *stare decisis* " stands together with " a perpetual process of change."

Cardozo, Holmes, Wright and others have described aspects of the judicial choice-making as seen and felt by the judge, and a great but scattered and controversial literature has attempted such description from the outside. The elements of judgment involved are unlikely ever to receive adequate description, even in an age in which " decision-making " in general has become a fashionable focus of social inquiry. The framework of judicial choices within the matrix of the " rule of *stare decisis*," in any case, sets judicial decision-making somewhat apart. While it is no part of the present purpose to attempt any general description, one or two more limited observations may here be added.

Perhaps the two commonest ways of referring to the development of the common law have been in terms of (1) a process of trial and error by which the limits of a rule are progressively defined; or (2) the search among the authorities for the " closest " or " the right " analogy. In both these ways of speaking, when we think them through, certain essential insights are well embedded. If we think of the plotting of the limits of a rule by trial and error, there is involved at each point the later court's assessment of the relevance of the former problem to the instant one, and the wisdom of incurring the logical and social consequences of the former decision in connection with its present duty of choice. And which alternative is chosen from the versions of the material facts (or of the *ratio* of the precedent case) made or left available by the authoritative materials, will reflect the assessments thus made. If we think in terms of the use of analogy then, again, there are involved

judgments as to the "similarity" of the problem presented by the precedent case to that in the instant one, and as to the version of the *ratio* of the precedent case by use of which (in terms both of logical and social consequences) that similar problem will receive a "similar" solution in the instant case. In either way of speaking, it is impossible to confine the ingredients of judgment either to the logical relations between legal propositions, whether actual or potential, and whether framed in terms of "material facts" or of enunciated principles, or to the social consequences arising from one choice or compared to another, or to judicial views of "public policy," "ethics," "justice," "expediency" or other standard of what is deemed desirable. And by the same token, we also cannot exclude *a limine* the operation of any of these groups of considerations as an ingredient actually and properly to be entertained.

In short a "rule" or "principle" as it emerges from a precedent case is subject in its further elaboration to continual review, in the light of analogies and differences, not merely in the logical relations between legal concepts and propositions; not merely in the relations between fact situations, and the problems springing from these; but also in the light of the import of these analogies and differences for what is thought by the later court to yield a tolerably acceptable result in terms of "policy," "ethics," "justice," "expediency" or whatever other norm of desirability the law may be thought to subserve. No ineluctable logic, but a composite of the logical relations seen between legal propositions, of observation of facts and consequences, and of value-judgments about the acceptability of these consequences, is what finally comes to bear upon the alternatives with which "the rule of *stare decisis*" confronts the courts, and especially appellate courts. And this, it may be supposed, is why finally we cannot assess the product of their work in terms of any less complex quality than that of wisdom.

Among recent statements which express something of the *nuances* and delicacies of balance involved, is that of Dean Erwin N. Griswold:

> ". . . There is in nearly every case an area of choice. How a judge marks out and determines that area largely determines the type of judge he is. In this area, most matters are ones of degree, ones of more or less. They are not black and white.
>
> If a judge keeps this area too small, he is likely to be a poor judge, for he will be too hidebound by precedent, too much tied to the past, too unaware of the relevance of variations in the situation before him.
>
> On the other hand, if a judge allows this area to be too broad, he is not likely to be a good judge. He may run some risk of deciding according to his own personal choice rather than according to law as he is given light to understand the

> law; he may give too little weight to precedent, and make the law unsettled.
>
> Most judges successfully avoid these extremes. Even then, there is an area of choice. That is what judges are for. Within this area, it may not be possible to give a purely logical demonstration that one result is better than another. A judge has to call on all the resources of his experience and wisdom in coming to a conclusion. Some judges hew rather closely to the line; some are more free-wheeling." [37]

When, therefore, Lord Wright says that " judging is an act of will," and that " notwithstanding all the apparatus of authority, the judge has nearly always some degree of choice," this is but the negative side of the answer to the question how the " perpetual process of change " in the common law can be reconciled with " the rule of *stare decisis*." The rest of the answer lies in the wisdom of the exercise of the duty of judicial choice down through the generations. It flows from recognition that our law constantly produces and reproduces new areas for choice-making not only by frequent resort to what I have called " categories of illusory reference " of substantive law, but (above all) by maintaining at the centre of " the rule of *stare decisis* " a notion of the *ratio decidendi* of a case which is almost a perfect medium for the creation of multiple and competing references. While, thus leaving room for the play of contemporary insight and wisdom, however, the notion also directs the attention of the later court to the contexts of earlier cases, and to the views of logical consistency, experience and values displayed by judges in the earlier contexts. It thus tends to ensure that what official experience there is relevant to the instant situation is taken into account.

If we are to recognise in this wider sense the truth of Holmes' view that " behind the logical form lies a judgment as to the relative worth and importance of competing . . . grounds, often an inarticulate and unconscious judgment," the question may properly be raised how far judgment is likely to become wiser by dint of bringing its grounds to judicial consciousness and articulation. That is a large and hazardous question on which perhaps the passage of years may lead this writer to qualify such confidence as he seemed to express in 1946. Yet the answer to that question cannot affect the duty of all of us, especially in free societies, to cherish the processes by which we are held together; and the duty to understand is not the least important corollary of the duty to cherish. If we must continue to think of *stare decisis* as sanctifying still any particular " principles of the common law," then let us also see the deep relevance of Ehrlich's truth that " apparently stable

[37] Erwin N. Griswold, " Earl Warren and the Supreme Court," *The Christian Science Monitor*, December 23, 1958. While the context of the quotation concerns the Supreme Court of the United States, Dean Griswold has informed me that it represents accurately his view of the role of choice throughout judicial activity.

principles," can "become so general by the uninterrupted process of extension and enrichment of their content . . . that they are adaptable to the most diverse situations. . . . In actual fact (the norm) is not the same norm at all; it has remained unchanged in appearance only; it has received an entirely new inner content." Even thus, perhaps it is, that the "rule of *stare decisis*" maintains its sway over the common law, by *compelling* a self-perpetuating self-renewal of what the common law contains.

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THE VITALITY OF CASE-LAW UNDER A CRIMINAL CODE

RECENT years have seen an understandable increase in dissatisfaction with the present form and machinery of the English criminal law. Dr. Glanville Williams has recently expressed the view that:

> " The English criminal law is a disorganised mass of statutes and precedents, the latter scattered over many hundreds of volumes of law reports. Although the law as a whole is well settled, some of it is intricate to the last degree; some precedents are conflicting; in some the extent of the decision is uncertain; some are of doubtful authority, either because of the unsatisfactory nature of the rule laid down in them, or because of some precedent or argument not having been brought to the attention of the court." [1]

This is here accepted as being a fair summary of the present position. Whether, however, this present position is " due to the failure of the two great codification movements of the nineteenth century " [2] and whether it necessarily follows that " we should begin to think of codification again " [3] are different matters. There is a need to resolve conflicts between precedents; there is a need to clarify decisions the extent of which is uncertain; one might perhaps add that there is a need to correct mistakes; but this says no more than that there is a need for piecemeal reform of a clarificatory nature. Some branches of the law are no doubt outmoded, and hence there is a need for remoulding according to the demands of a more enlightened policy. None of this, however, justifies codification.

There remains the question of the intricacy of the English criminal law. Does this justify codification? Before one can answer this question in the affirmative, one must be satisfied on two points. The first of these is that intricacy is an unnecessary evil. On this point, it is enough to point out that merely to demonstrate that intricacy may and does result in injustice does not establish the converse proposition that simplicity will eradicate injustice. It is yet to be established that a certain and knowable law will be a just law.

The second of these points is this. Do codes dispense with intricacy? Does codification bring independence of case-law? It is with these points that this article is concerned.

The Society of Public Teachers of Law Memorandum on the Establishment of a Criminal Law Reform Committee envisaged that such a body " would no doubt be greatly assisted by the various

[1] (1958) Journal S.P.T.L. 217–218.
[2] *Ibid.*, p. 218.
[3] *Ibid.*

Dominion and Colonial Codes. . . ." [4] Always remembering that the potential of the Tasmanian experience to render such assistance is very limited, these comments are offered in this connection.

Tasmania inherited the principles of the Common Law, including its criminal law. For over a century, the criminal law administered in Tasmania was to be found basically in the cases, part of it *via* the medium of legislation drafted on English lines. In 1924, a criminal code, based largely on that of Sir James Fitzjames Stephens, was introduced. Whilst it is too early to form a final conclusion as to its success or otherwise as a code, it is not too early to discern certain trends in the attitude towards the "old" law—an attitude which may shed light on the problem of codification as a whole.

What is a Code?

The word "code" is not a term of art. Codification may, however, be distinguished from consolidation.

> ". . . *consolidation* merely reduces into shape the law as already written in many existing statutes; whereas *codification* not only does that, but fuses into the new whole the Common Law (as laid down by judicial decisions) besides." [5]

The hall-mark of the "code" would therefore seem to be that it purports to contain within its terms all the law, as opposed to merely one part (*i.e.*, statute law) of that law. Even thus delimited, however, two possibilities remain. A code may, on the one hand, purport to destroy all the pre-existing law, as did the Code Napoléon. Such a code pretends to be sufficient unto itself and all other sources are proscribed. On the other hand, the word "code" in common law jurisdictions is applied to compilations which do not necessarily go as far as this. Cases decided before its coming into force are still frequently cited in connection with actions brought under the Sale of Goods Act, 1893, the function of which is therein described as that of "codifying the law relating to the Sale of Goods." [6] We may justifiably describe as a "code," therefore, an enactment which purports to contain all the law upon a particular subject, but which, nevertheless, may allow some reference to previously decided cases in order to make its provisions meaningful.

Is the Tasmanian Criminal Code a Code?

The Tasmanian Criminal Code comprises the First Schedule to the Tasmanian Criminal Code Act, 1924. By section 2 (1) of that Act, it is provided:

> "After the passing of this Act, the provisions contained in the Code of Criminal Law set forth in the First Schedule, and

[4] Reproduced in (1958) Journal S.P.T.L. 231 at 232.
[5] Wharton's *Law Lexicon*, 12th ed., 1916, *sub nom.* "Code."
[6] Long title, [1893] L.R. Statutes 353.

> hereinafter called 'the Code,' shall be the law of this State with respect to the several matters therein dealt with."

By its long title, the Act is "An Act to declare, consolidate and amend the Criminal Law, and to establish a Code of Criminal Law." It thus appears that "with respect to the several matters therein dealt with," the law within the State of Tasmania is to be found solely in the Criminal Code, and not at all elsewhere.

It is pertinent, first of all, to point to the fact that several important "matters" are not "therein dealt with." Perhaps the most important of these are defences available at common law. Section 8 of the Act provides:

> "All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to a charge upon indictment, shall remain in force and apply to any defence to a charge upon indictment, *except insofar as they are altered by, or are inconsistent with, the Code.*"[7]

As will be readily appreciated, the italicised clause gives rise to serious difficulties. For example, section 20[8] of the Code defines the defence of "compulsion" in terms very reminiscent of the common law "duress *per minas*." The Code, however, makes no mention of simple "duress," nor of "superior orders," nor of "necessity" all of which may possibly, in certain circumstances, operate as defences at common law. Are they, in Tasmania, to be regarded as "altered by" or "inconsistent with" the Code by virtue of the fact that the Code deals with the question of constraint, though giving it a limited effect, or are they saved by section 8?

Another important matter which is not therein dealt with is that of summary proceedings. The extent of this immunity is not entirely clear due to an ambiguity, as yet unresolved, in one of the Code provisions creating it.[9] The nearest judicial comment to what

[7] Italics supplied. It would seem that common law defences which are written into the Code, but which are not thereby altered or rendered inconsistent, survive. There may thus be two identical co-existing defences, one common law and one under the Code. The point remains academic until such time as the relevant provisions are repealed and questions of the survival and date of "freezing" of the common law arise.

[8] "(1) Except as provided by section sixty-four, compulsion by threats of immediate death or grievous bodily harm, from a person actually present at the commission of the offence, shall be an excuse for the commission, by a person subject to such threats, and who believes that such threats will be executed, and who is not a party to any association or conspiracy the being a party to which rendered him subject to compulsion, of any offence other than treason, murder, piracy, offences deemed to be piracy, attempting to murder, rape, forcible abduction, robbery with violence, robbery, causing grievous bodily harm, and arson."

[9] S. 4 provides as follows: "(1) After the passing of this Act every statute shall, for the purposes of this Act, be read and construed as if any offence therein mentioned for which the offender may be prosecuted on *indictment or information* (however such offence may be therein described or referred to) were described or referred to as a crime as defined by the Code; and all provisions of this Act relating to crimes generally shall apply to every such

might be claimed to be an interpretation of the status of summary proceedings in relation to the Code is that of Crisp J., in *Woodruff* v. *Nolan*,[10] " Hands off summary proceedings under statute."

The claim of this legislation to the title " code " is, however, justified by section 6:

> " After the passing of this Act no person shall be proceeded against as for a crime as defined by the Code, except under the provisions of this Act, or of some other Act, or of some Commonwealth Act, or of some Imperial Act in force in this State."

Since " crime " is defined in section 1 of the Code as " an offence punishable on indictment " and since, by section 4 of the Act, the provisions of the Code extend to all crimes in no matter what statute contained, it can be seen that although many common law defences survive, and although certain summary proceedings remain governed by common law, proceedings on indictment can only be carried through under the provisions of the Code. To all such proceedings the provisions of the Code apply. Most " crimes " are, in fact, made such by the Code itself.

The Usual Relation of Case-Law to Codes at Common Law

The *locus classicus* as to the usual relation of case-law to codes at common law is the dictum of Lord Herschell in *Bank of England* v. *Vagliano Bros.*[11]:

> " I think the proper cause is in the first instance to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the

offence. (2) Where in any statute reference is made to proceedings upon information in the Supreme Court, the same shall be construed as a reference to proceedings upon indictment. (3) Nothing herein contained shall be construed to affect the construction of any statute, or of any provisions thereof, referring or relating to summary proceedings."

The source of difficulty is the meaning of subs. (3). Alterations of the common law by the Code could be applied to summary proceedings under s. 4 (1) without affecting the construction of the relevant statute or any of its provisions, as opposed to affecting the application of the common law to summary offences. Is there any reason why the Code defences should not apply instead of the common law defences to a statute creating a summary offence but silent on the question of defences? See, however, *Knibbs* v. *Turner* (1958) unrep. as yet, where the plea of *autrefois acquit* having been raised in summary proceedings, Crisp J. states: " It may be a solecism to refer to this defence in a summary court as a plea of *autrefois acquit*, such being the technical names of the written pleas found only in the Supreme Court in proceedings on indictment " (under s. 355 (1) II).

Another difficulty is the extent of s. 4 (1). An offence may be punishable (1) upon indictment; (2) upon information; or (3) upon information or indictment. The italicised words may apparently be taken as referring to all three classes of offence or as to such only as fall within class (3). The preferable view would seem to be that s. 4 (1) deals with all three classes of offence. The prevailing practice, although the point does not seem to have been expressly raised, supports this.

[10] (1934) 29 Tas.L.R. 127, 130.

[11] [1891] A.C. 107, 144.

previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. . . .[12]

"I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the Code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step to be taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

"One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter and did alter it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment." [13]

In quoting this dictum with approval in *Robinson* v. *Canadian Pacific Railway Co.*,[14] the Judicial Committee of the Privy Council emphasises the prohibition on resort to pre-existing decisions:

"Their Lordships do not doubt that, as the noble and learned Lord in the same case indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some such special ground." [15]

[12] Crisp J. in *Woodruff* v. *Nolan* (1934) 29 Tas.L.R. 127, puts it: "We have, however, to construe the Code; if its language is plain and clear, there is no more to be said, despite the consequences."

[13] Lord Bramwell, at [1891] A.C., p. 137, did not accept this latter view, partly because, according to its long title, the Act was an "Act to *Codify* the Law relating to Bills of Exchange," not to alter or amend it, and partly because of s. 97, which saves the common law except in so far as it is inconsistent. The former ground, with respect, attaches undue significance to the long title which cannot be employed so as to avoid the consequences of the operative parts of the Act; Lord Bramwell's latter ground is believed to involve a *petitio principii*. How can the Act be judged inconsistent until it is construed? See also *per* Cozens-Hardy M.R. in *Bristol Tramways* v. *Fiat Motors* [1910] 2 K.B. 831, 836.

[14] [1892] A.C. 481.

[15] At p. 487; see also *per* Atkin L.J. in *Re Wait* [1927] 1 Ch. 606, 635–636.

From these statements, it is possible to deduce the following rules:

1. All pre-existing case-law ceases to be of authority as regards stating the law (as opposed to being an authoritative source of interpretation in special cases, as, of course, is the *Oxford Dictionary*).
2. The law is to be deduced from an examination of the language of the statute, in its natural meaning.[16] Hence, it is improper to inquire as to the state of the pre-existing law in order to attempt to construe the provisions of the Code in such a way as to make the latter comply. The presumption of statutory interpretation that an enactment does not alter the pre-existing law does not apply to codes.[17]
3. Given a "special ground," it is permissible to refer to the pre-existing case-law in order to ascertain the meaning of the Code. Two such grounds are:
   (a) That the code provision is of doubtful import. It is submitted that Lord Herschell's reference to "natural meaning" restricts the operation of the "doubtful import" exception. A word may have a "natural meaning" and a "secondary" meaning. In this case the provision, although ambiguous, does not fall within the "doubtful import" exception. If the other view is taken, then Lord Herschell's reference to both "natural meaning" and "doubtful import" was tautologous. A provision is regarded herein as being of "doubtful import" where it is capable of two or more meanings neither or none of which can be said to be "natural" or primary, and also where it is vague,[18] that is to say where it is impossible to attribute any definite significance to it.
   (b) That words used had acquired, prior to the introduction of the Code, a technical meaning.[19]

[16] See the discussion by Montrose in (1959) 1 *University of Malaya Law Review*, 87, at pp. 94–99.

[17] *Sutherland* v. *Nichol* [1951] W.N. 110, does not suggest otherwise. The House of Lords on that case was divided 3–2 (Lord Simonds, Lord Normand, Lord Reid; Lord Morton of Henryton and Lord MacDermott dissenting). The only report the writer has been able to trace contains nothing more than a brief summary of the judgment of Lord Simonds. That summary seems to indicate that Lord Simonds did not consider the code provision in question "irresistibly clear." Two interpretations were possible, both effecting changes in the pre-existing law. Lord Simonds adopted the narrower.

[18] The word "reasonable" can hardly be classified as a technical term; nor is it ambiguous; it may, however, fall within the "doubtful import" provision as being vague.

[19] The categorisation of a term as "technical" raises difficulties. It makes for clarity to regard the "technical term" justification as being an exception to the above rule of non-reference in cases of secondary meanings. There is, of course, no objection to going back to the cases in order to determine whether a term is "technical." This is a different thing from actually using the

Two other matters may be briefly adverted to, as relevant to this matter, although not considered in detail. A technical meaning can be acquired by words. Thus, at a remote time before the introduction of the Code, words used may not have had a technical meaning, although later such was acquired. Also, words which did not have a technical meaning at the time of introduction of the Code might subsequently have acquired it. Thus, the two following rules may be tentatively stated:

1. The relevance of cases decided before the introduction of the Code will vary more or less in inverse proportion to their age. A very old case will be of little value as compared with a comparatively recent one.
2. Cases decided in other jurisdictions after the introduction of the Code are not relevant at all. The only possible exception to this is where the case in question is expressly declaratory of the law as it existed at the material time.

The Use of Common Law Cases under the Tasmanian Criminal Code

A study of the cases decided in Tasmania since the introduction of the Code, thirty-five years ago, reveals some interesting practices. The tendency on the whole has been for the bench to maintain an attitude of propriety towards code-interpretation and use. The bench has not, however, always succeeded in restraining the perhaps not surprising tendency of the Bar to attempt to "go back to the authorities" in preference to a strict reliance on code provisions.

It is proposed to examine this tendency from two points of view, first, the use of cases as sources of law, and secondly, the use of cases as sources of meaning.[20]

Use of Pre-existing Authorities as Sources of Law

In theory, the Code contains all the law in Tasmania with regard to the matters therein dealt with and this theory has, of course, received implementation in practice. In many cases which it would be purposeless to enumerate, clear and unambiguous provisions of the Code have been applied without more ado. Nor, if an accurate picture is to be obtained, should it be forgotten that the greater number of cases are decided in the lower courts and are, hence,

cases. A search might reveal a particular interpretation of a term in the pre-existing cases. Such an interpretation could not be used unless it was "technical." "Technical" seems to mean having a particular meaning in a particular legal context. Thus, "taking away" has one meaning for the purposes of the law of larceny and another, technical meaning, for the purposes of the law relating to the abduction of females.

[20] The distinction drawn here is between the use of cases directly (*i.e.*, as a source of law) and indirectly (*via* the Code, as a source of meaning of terms used in the Code).

largely unreported. A frequent ground of appeal (which will greatly enhance the likelihood of reporting of the case in question) will be the alleged misuse of the doubtful provision with which we are largely concerned. We may expect, therefore, to find a higher proportion of questionable uses of cases among the reports than in the normal run-of-the-mill of magistrates' cases. On the other hand, there is always the factor of accepted improper practices to consider. It may well be that appeal is not taken from decisions of the lower courts because of such practices.

The reported cases do reveal that the common law still lingers. It is possible to point to several instances where, in spite of the Code, the law has been sought in the cases. The error is of two main types:

1. *The use of cases in ignorance of the alteration of the common law by the Code*

We are dealing here with cases where the enactment of the Code has resulted in clear changes of the pre-existing law. Whether such change was effected unwittingly or not is not here relevant. There is, however, a distinct temptation to assume the continuity of the old law and to neglect the new. Such neglect has, as might be expected, been attempted much more frequently than it has succeeded. Thus, in *R.* v. *Reason*,[21] the accused had been indicted for defilement of a defective under section 126 (2) of the Code which provides that:

> "Any person who has unlawful carnal knowledge of a female . . . under care or treatment in, or on leave from, an institution or certified house . . . is guilty of a crime."

It was argued by the prosecution, on the basis of the English case of *Shipman* v. *Shipman*,[22] and the New Zealand case of *R.* v. *Hirst*,[23] that a defective who had escaped and was thus absent without leave from an institution or certified house could be regarded as "notionally under the care or treatment of the institution." This argument was rejected by the court, which was of opinion that although the provision might not be entirely clear in some respects [24] in this one, at least, the ordinary meaning of the words, particularly "in" and "or on leave from," must prevail.

Similarly, in *Packett* v. *The King*,[25] where the accused had been arraigned on an indictment containing two counts of murder, it

[21] [1953] Tas.S.R. 49.
[22] [1939] P. 147.
[23] [1932] N.Z.L.R. 300.
[24] Thus, Gibson J. at p. 51: "I think it might well be that a mental defective under care or treatment in an institution could temporarily be absent without leave and still be under care or treatment," however, "in the ordinary meaning of the words no jury could reasonably find that Brown was in fact under care or treatment in St. John's Park. She was absent from such care and treatment, having effectively made her escape."
[25] [1938] Tas.S.R. 18; see also *Martin* v. *The King* [1942] Tas.S.R. 9.

was argued by the defence [26] that section 311 (3) of the Code [27] must be construed in accordance with the English cases, *R.* v. *Holt* [28] and *R.* v. *Jones*,[29] that is, as meaning that no indictment for murder should contain more than one count. The court felt otherwise, it is submitted rightly so. Section 311 (3), though perhaps ambiguous, is nevertheless not of doubtful import, the only circumstance which would have justified reference to common law. The words " other crime " give no difficulty if they are construed in the generic sense in which the word " murder," to which they refer, appears in the same provision and which is its " natural " meaning in an enactment relating to the law of crimes.

This same case, however, contains an example of resort to common law cases for *law*. In substance, *Packett's* case was an appeal on grounds of misdirection from a direction that the crime " was murder or nothing." This, it was argued, was a withdrawal from the jury of the possibility of a verdict of manslaughter, expressly prohibited by *R.* v. *Grimes and Lee* [30] and *Brown* v. *R.*[31] That argument succeeded:

> " . . . in such a case as this the jury has the right to return a verdict of manslaughter, notwithstanding that the trial judge has ruled that any matter alleged as provocation is not capable of constituting provocation."

The authority relied upon for this particular statement was the following dictum of Barton A.C.J. in *Brown's* case [32]:

> " There can be no doubt that on a charge of murder the jury are entitled to return a verdict of manslaughter, though on the facts the case be one of murder or nothing."

The terms of this dictum are to be contrasted with section 322 of the Code dealing with general provisions relating to alternative convictions in these terms:

> " Where in any section it is provided that upon an indictment for a particular crime the accused person may be convicted of any other specified crimes it shall be intended thereby that if the jury find such person not guilty of the crime with which he is charged he may be convicted of such other crimes specified in such section *as is established by the evidence . . .* " [33]

[26] [1938] Tas.S.R. at p. 21.

[27] " No indictment for murder shall contain a charge of any other crime."

[28] 7 C. & P. 518.

[29] [1918] 1 K.B. 416.

[30] 15 N.S.W.L.R. 209.

[31] 17 C.L.R. 570.

[32] *Ibid.*, at p. 578.

[33] Italics supplied. A supporting ground relied upon by the court was that such a course would amount to the judge finding a verdict which, on the authority of *Woolmington's* case, he could not do. *Woolmington's* case is hardly in point. The application of the presumption of intention suggested in that case may have been as good as finding a verdict leaving, as it did, no option to the jury. In *Packett's* case, the direction left to the jury exactly the same

If, "on the facts," the case is one of murder or nothing, manslaughter is not "established by the evidence." The only question remaining, therefore, is whether the judge was entitled to say so. Section 371 x, states:

> ". . . the judge shall instruct the jury as to the law applicable to the case, with such observations upon the evidence as the judge may think fit to make . . ."

The trial judge was therefore obliged to state whether the law of manslaughter was "applicable to the case." It was only applicable if it was "established by the evidence." The trial judge, if he thought fit to do so, might observe that there was no evidence which would have supported a verdict of manslaughter. Much the simplest way to do these things was to tell the jury that the case was one of "murder or nothing," as he did. What the appellate court failed to see was that section 322 deprives the Tasmanian jury of that residuum of discretion which entitled its counterpart at common law to fly in the face of the facts in this one instance.[34]

R. v. *Kent-Newbould*[35] provides another example of resort to cases in common law jurisdictions for law. The point which concerns us here is whether acquittal on a charge of stealing a motor-vehicle entitled the accused to plead *autrefois acquit* to a subsequent indictment for receiving arising out of the same facts. By section 355 (1) II of the Code, an accused person may plead, *inter alia*:

> "That he has already been acquitted or convicted— . . . (*c*) of a crime arising out of the same facts and *substantially the same crime as that charged in that indictment.*"[36]

The question was therefore whether "receiving" could be considered as "substantially" the same crime as that charged in the former proceedings, *i.e.*, stealing. The answer was given in the negative on the authority of a dictum of Parke B., in *R.* v. *Blackson*[37]:

> "The reason why counts ought not to be joined in an indictment against a prisoner for stealing and also for receiving is because they are in fact totally different offences."

choice that it always has in the absence of the possibility of an alternative verdict, *i.e.*, the choice between guilty and not guilty.

The distinction between the common law and the Code on this point is emphasised by the fact that manslaughter, concealment of birth, causing the death of a child before birth, and infanticide are all alike alternative convictions upon an indictment for murder. The sole criterion of the applicability of any of these is the same, *i.e.*, whether it is established by the evidence. Would the trial judge have been wrong in law in directing the jury that since the victim was an adult they could not return a verdict of infanticide? This is not to suggest that the common law jury could do so, but rather that whereas at common law the jury's powers in respect of alternative verdicts of infanticide and manslaughter differ, under the Code they do not.

[34] Archbold, para. 197.

[35] [1940] Tas.S.R. 67.

[36] Italics supplied.

[37] 8 C. & P. 43, 44. Apparently what is "totally distinct" for the purpose of joinder of counts may not be so for other purposes. See the further discussion of *Kent-Newbould's* case, below, pp. 635–636.

This is quite true—at common law. But neither stealing nor receiving is the same crime under the Code that it was at common law. One might mention particularly that by section 258 (1) of the Code:

> " Any person who, without lawful excuse, receives or *has in his possession*, any stolen property, knowing it to be stolen property, is guilty of a crime . . . "[38]

i.e., receiving, dispensing with the common law requirement that knowledge that the property is stolen at the time of receipt must be established.[39] There thus seems to be no good reason why every thief in possession of his spoils is not guilty also of receiving, though he could hardly be convicted of the latter at common law and it would seem, indeed, that the accused in *Kent-Newbould's* case was in peril of conviction for either offence in circumstances which would hardly have warranted a conviction for receiving at common law. In certain circumstances, stealing and receiving are the same crime in Tasmania. Whether they are to be regarded as " substantially similar " for the purposes of section 355 is not easily answered, but it is a different question from that answered in *Blackson's* case and is, furthermore, a question to be decided by reference to the Code.

Use of Cases due to an assumption that matters dealt with in the Code are not dealt with. The scope of the Code is not the whole of criminal law and procedure. Resort to the common law is thus frequently justified. There is, however, evidence of a tendency to assume the existence of a lacuna where in fact there is none, resulting in unwarranted resort to common law.

It is not always easy to determine whether a matter is " dealt with " by the Code. In *R.* v. *Radford*,[40] for example, the importance of this determination can be clearly seen. An indictment charging two offences was filed. Shortly thereafter, and before proceedings had been commenced, two further offences were discovered. At this point, the prosecution attempted to enter a written *nolle prosequi*. Section 350 (1) of the Code provides:

> " If at any stage of the proceedings upon indictment a Crown Law officer informs the court that the Crown will not proceed further upon that indictment—
>
> I. The judge may direct the jury to return a verdict of not guilty and thereupon the accused person shall be discharged; or
>
> II. In the absence of any such direction the accused person shall be discharged from any further proceedings upon that indictment but may be again indicted upon a fresh indictment, subject to the limitation of time, if any, within which proceedings must be instituted."

[38] Italics supplied. The actual charge set out is " receiving stolen property."
[39] *R.* v. *Johnson* (1911) 6 Cr.App.R. 218.
[40] [1951] Tas.S.R. 1.

The defence argued that the *nolle prosequi* had not been delivered during proceedings but prior to them and that therefore section 350 did not apply. The proper course was therefore for the court to enter a formal verdict of "not guilty" and discharge the prisoner, since no provision was made for the entry of a *nolle prosequi* at any other time and the Crown's action therefore amounted to a failure to adduce any evidence. The point before the court can thus be seen to be "what was the matter dealt with?" If it be regarded as "criminal procedure," "termination of proceedings" or even "*nolle prosequi*," resort cannot be had to the common law rule that reindictment may always follow the entry of a *nolle prosequi* which entry may be made at any time after the signing of the indictment.[41] If, on the other hand, the court chose to regard the matter dealt with as "delivery of a *nolle prosequi* during proceedings," then the Code was exhaustive to that extent only and delivery of a *nolle prosequi* prior to proceedings would remain governed by common law, thus allowing reindictment. The latter course was taken. There seems to be no reason, however (nor was one stated), why any other of the views could not legitimately be taken.

Within a small area, no problem exists. If, for example, a *nolle prosequi* is delivered during proceedings, there can be no doubt that the judge must act either under paragraph I or II of section 350 (1). That this "minimum extent" test does not solve the whole of the problem is clearly demonstrated by the example of compulsion cited earlier.[42]

One fruitful source of difficulty in this connection has been the question of the extent to which grounds of appeal are "dealt with" by the Code. Section 401 (1) provides:

> "A person convicted before a court of trial may appeal to the court—
>
> I. Against his conviction on any ground which involves a question of law alone; or
>
> II. Within the leave of the court, upon the certificate of the judge of the court of trial that it is a fit case for appeal, against his conviction upon a ground of appeal—
>
> (*a*) which involves a question of fact alone
>
> (*b*) which involves a mixed question of fact and law
>
> (*c*) which appears to the court to be a sufficient ground of appeal . . ."

Beyond these, no express provisions exist. In many cases, as, for example, in *Packett* v. *The King*,[43] extensive reliance has been placed upon common law cases in order to determine what are valid grounds of appeal. In not all instances, however, will such reference

[41] Archbold, para. 109.
[42] p. 623, above.
[43] [1938] Tas.S.R. 18.

be justified. It must be clear, for example, that what is a question of law may well be a matter which can only be determined by reference to the Code. Furthermore, it is quite clear that no decision of any other court can be an authority for "what appears to *the* court."[44] There is thus danger in the assumption that there exists a complete lacuna which may be filled by resort to common law in the same way that there is danger in assuming that the close similarity between grounds of appeal in Tasmania and in England makes all English cases applicable. The receptacles are of identical shape but they have different contents.

A similar problem arises in connection with section 402 (2):

> "The court may, notwithstanding that it is of the opinion that the point raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

The difficulty here is that in practice authority is hardly possible upon the question whether a substantial miscarriage of justice has occurred. Circumstances are infinite and the same error in two cases might involve gross miscarriage in one and none whatever in another. Resort has nevertheless been had to decisions at common law in order to deal with this problem. In *Taylor* v. *The King*,[45] the question whether the admission of certain inadmissible evidence had caused a substantial miscarriage of justice was answered on the "authority" of *Makin* v. *Attorney-General for N.S.W.*,[46] in which case similar evidence was wrongly admitted. The widely differing fact situations in the two cases were, however, ignored.

So also, in *Marley* v. *The King*,[47] the argument that section 402 (2) was substantially identical with the proviso to section 4 of the Criminal Appeal Act, 1907, and that that proviso had been applied in English cases involving the same error was persuasive with the court. Clark J., however, in a dissenting judgment, was not satisfied of the relevance of the English authorities. One difference in the circumstances seemed to him crucial[48]:

> "It is to be remembered that the English Court of Criminal Appeal has no power to order a new trial. Under 'The Criminal Appeal Act, 1907,' it is a case either of upholding the conviction or quashing it. . . . But this court is invested with the power to order a new trial."

Yet another instance is to be found in *Broughton* v. *Williams*,[49] in which case an officious bystander sued a constable for false imprisonment, the latter having arrested him half an hour after he had incited the latter's then prisoner to resist arrest and had

[44] Italics supplied.
[45] (1926) 22 Tas.L.R. 22.
[46] [1894] A.C. at p. 68.
[47] (1935) 30 Tas.L.R. 134.
[48] *Ibid.*, at p. 140.
[49] (1932) 28 Tas.L.R. 1.

aroused a mob with the same intent. The sole issue relevant for present purposes was whether the arrest was unlawful. Of four judgments delivered during the history of the case, three held the arrest to be lawful by reference to common law only. The fourth, Clark J., pointed to the fact that the circumstances (about which none of the judges disagreed) clearly amounted to the crime of incitement to resist arrest (an opinion not disapproved by the other judges) and held, therefore, that the arrest out of which the action arose was lawful by the express provisions of section 27 of the Code.[50]

Perhaps the most fundamental rejection of the Code in favour of the common law occurred in *Packett's* case [51] at first instance. In directing the jury as to the onus of proof, on the prosecution, the trial judge stated:

> "In a recent case that went on appeal in England it was held that a trial for murder must prove that death is the result of a voluntary act of malice . . ." [52]

No mention was made of section 13 (1) of the Code which provides, apparently superfluously, that:

> "No person shall be criminally responsible for an act, unless it is voluntary and intentional."

From these instances, it can be seen that in the practice of one jurisdiction at any rate, codification of a branch of the law has not had the effect, insisted upon by Lord Herschell in the *Vagliano* case and assumed by the protagonists of codification, of destroying the authority of pre-existing cases as sources of law. There remains to be considered, however, the use of prior cases as points of departure for the interpretation of Code provisions.

2. *Use of pre-existing cases as points of departure for interpretation*

We have seen,[53] in the *Vagliano* and *Robinson* cases, that resort to pre-existing cases as aids in interpretation is proper given a special ground. The two special grounds mentioned in these cases are (1) where the provision concerned is of "doubtful import," and (2) where the words concerned have acquired a "technical meaning" prior to codification. These cases make it clear that the law is to be distilled, where possible, from an examination of the language of the statute in its natural meaning, and not from an eclectic approach which has as its point of departure the presumption that the old law stands if the Code can possibly be made to fit.

A code of criminal law must necessarily contain many technical terms. Any legislation is bound to be of doubtful import in some

[50] s. 27 (1) provides: "It is lawful for a police officer to arrest without warrant any person whom he finds committing a crime."
[51] [1948] Tas. S.R. 18, 29.
[52] Apparently a reference to *Woolmington's* case.
[53] Above, pp. 624–626.

respects. When such situations have arisen under the Tasmanian Code, the correct course has frequently been followed. In *R.* v. *Mejac*,[54] a girl of fourteen asked the prisoner to take her away, stating that if he did not do so she would go of her own accord. He accordingly consented and accompanied her, making all arrangements for travelling and accommodation. He was duly indicted, under section 189, for the crime of abduction of a girl under eighteen:

> "Any person who unlawfully takes away, or causes to be taken away, any unmarried girl under the age of eighteen years out of the possession and against the will of her father or mother or other person having the lawful charge or care of her, is guilty of a crime."

The defence based itself upon the contention that the accused had not taken away the girl, since she had gone of her own accord at her own request. This was, however, rejected, it is submitted, rightly, on the ground of the technical meaning attributed to "taking away" in this context at common law.

However, reference to common law cases has not always been justified under the rules in the *Vagliano* case. In fact, much the most fertile source of citation of common law cases has been what seems to be a desire to bolster up the Code; almost a feeling that the Code is not quite sufficient as it stands and that it must be supported in some way. Even in *Mejac's* case, reference to common law was carried to a greater length than was strictly permissible. Insofar as they established that the idea of physical abduction or trespass and asportation was not inherent in the technical meaning of "taking away," resort to the cases was perfectly justifiable. But insofar as they were used, as they were, to demonstrate that it was sufficient that the accused was the "moving spirit," such resort was not. As the judge himself stated, this aspect of the technical meaning was clearly covered by section 190:

> ". . . it shall not be a defence that the girl was taken with her consent or at her own suggestion . . ."

Perhaps the most fertile source of examples of this unnecessary reference to cases is *R.* v. *Kent-Newbould*.[55] Section 355 (2), dealing with pleas, states that an accused person may plead together certain combinations of pleas there specified. The question under consideration in that case was whether pleas of not guilty and *autrefois acquit* could be combined. This was not one of the combinations specified in section 355 (2). One would have thought that that was an end to the matter, but not so Starke J. in the High Court[56]:

> "The accused had no right to plead this plea together with his plea of Not Guilty—Code, s. 355 (1) (2); *R.* v. *Banks* [1911] 2 K.B. 1095."

[54] [1954] Tas.S.R. 26.
[55] [1940] Tas.S.R. 67.
[56] *Ibid.*, at p. 81.

Similarly, in considering whether it was permissible to join two counts of stealing and one of receiving in the same indictment, reference was made to another provision which is not of doubtful import [57] and to *O'Connell* v. *The Queen*,[58] in support. This is rendered the more interesting since later on in the same case, *R.* v. *Blackson*, which goes directly contrary to *O'Connell* v. *The Queen*, is cited as an authority by analogy in another connection.[59]

These are instances where Code and case seem to have been accorded co-ordinate authority. There have, however, been occasions when the Code has been completely submerged. In *Kent-Newbould's* case, in the High Court of Australia, one judge, immediately after referring to section 355 (2) of the Code, listing the permitted combinations of pleas, states:

> "Except under express statutory provisions it is not permissible to join any other plea with a plea of not guilty: *R.* v. *Strahan*, 7 Cox 85." [60]

Yet no mention is made of section 2 of the Act.[61]

A further example is *R.* v. *Pearce*,[62] where argument by the Solicitor-General on the question whether a plea of guilty to a capital charge should be accepted is conducted throughout from Hale's *Pleas of the Crown*, without a single reliance upon the plain words of the Code, section 355 (1) of which provides:

> "An accused person may plead to an indictment— . . . That he is guilty of the crime charged in the indictment."

It can be seen from this brief survey that resort to common law as shedding light on the meaning of the Code is far from being a thing of the past.

It is not proposed to pursue in detail the questions of citation of venerable authorities, or of cases decided subsequently to the introduction of the Code. It will be seen from examples cited in other connections that there has been no excessive reticence on either of these points.

One final development may be adverted to. We have been exploring the persistence of the common law. It may not be out of place to refer to the reverse process—the dynamism of the Code. In a recent case concerning the summary offence of "disturbing the peace," the provisions of the Code relating to self-defence were

[57] s. 311 (2).

[58] 11 Cl. & F. at 295.

[59] The availability of *autrefois acquit* in cases of acquittal on a charge of a substantially similar crime arising out of the same facts. See pp. 630–631, above.

[60] This statement assumes that codes are like all other statutes. The implication of Lord Herschell's dictum in the *Vagliano* case is that a clear implication will suffice since it will not be of "doubtful import."

[61] See pp. 622–623, above.

[62] [1953] Tas.S.R. 69.

applied as a defence, despite section 4 (3).[63] Although not technically relevant, according to the prevalent view, the Code was put to use.[64]

We may therefore summarise as follows:

1. The Tasmanian Criminal Code is a code properly so-called in that it purports to be the exclusive source of law on matters contained therein (*i.e.*, broadly speaking, indictable offences).
2. The rules of Common Law as to Codes are:
   (a) Pre-existing case-law ceases to be of authority as a source of law.
   (b) The Code is to be construed by reference to its natural meaning. The presumption of non-alteration of the pre-existing law is not to be made in the cases of codes.
   (c) On special grounds, reference may be made to the pre-existing cases for purposes of interpretation as, for example, where the code is of doubtful import or has a technical meaning.
3. In Tasmania, cases have continued to operate as a source of law since the introduction of the Code.
4. Cases have been used as aids to interpretation where such use was not strictly permissible.
5. There is some evidence of the contrary process, *i.e.*, the application of the Code where it is not strictly relevant.

Conclusion

One immediate conclusion can be drawn. Codification of a particular branch of the law has not brought independence of case-law. Any attempt to list the factors responsible for this consequence must be in part speculative. The following suggestions are therefore put forward with some hesitancy.

It might be pointed out that the deviations from normal code-treatment which have been referred to herein are not vices inherent in the idea of the code, but are rather due to a wrong approach to its administration. This is probably true to some extent, and it may well be due to the fact that Tasmania remains for the most part a true common law jurisdiction and that those who work among the law are busy men. Again, judges and practitioners are almost exclusively trained either in Law Schools where the common law tradition flourishes or in offices where it is perpetuated. Any advocacy of the codification of the criminal law in England must, however, take account of the fact that all these influences exist in that jurisdiction too.

[63] See pp. 623–624, n. 9, above.
[64] *O'Rourke* v. *Boxhall* (1958) unreported as yet, and see pp. 623–624, n. 9, for a statement of the difficulties surrounding s. 4 (3).

Is this, however, the whole story? Lord Herschell, in the *Vagliano* case described the purpose of a code as being:

> " that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence." [65]

Evils must be removed, but, as was said earlier, piecemeal legislation is all that is required to dispense with such evils as obsolete proceedings. The sole justification of codification, if there be any at all, remains the intricacy of case-law. It is a justification if and only if intricacy is dispensable. Dr. Williams conditions justice on knowability and certainty. Is a code of five hundred sections, containing many technical terms and provisions of doubtful import, so very certain and knowable?

It is suggested that intricacy is necessary in any system which purports to have regard to the peculiarities of individual cases. Flexibility rather than certainty may be more conducive to justice, for human situations are themselves intricate.

Finally, it should not be overlooked that " the law as a whole is well settled." [66] Some of the cases above instanced demonstrate that it is all too easy to unsettle settled principles by codification. Any code falling short of perfection runs this risk, for it cuts itself off from that reference to pre-existing law which is the only test of error in compilation, and to allow such reference as an additional " special case " within the meaning of Lord Herschell's dictum in the *Vagliano* case is to beg the whole question of codification.

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[65] Use of the Code was not necessary, unless one breaks the peace by defending oneself against an assault, as opposed to attempting to restore it.
[66] n. 1, above.

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THE VALIDITY OF THE ACT OF NATIONALISATION IN INTERNATIONAL LAW

THE importance assumed by the questions which nationalisation raises in international law is eloquently brought out by the fact that in the year 1958 alone three great international institutions turned their attention to these problems: under the aegis of UNESCO the International Association of Legal Science held a discussion which lasted from February 24 to March 1, devoted to the law of nationalisation [1]; nationalisation was also one of the main items on the agenda for the International Bar Association Congress held at Cologne from July 21 to 26, 1958; and the International Law Association Conference held in New York from September 1 to 7, 1958.[2] In all these discussions an important place was naturally reserved for the validity of the act of nationalisation and its status in international law.

When we wish to assess the effect which nationalisation introduced in a particular country has outside that country, we have to take as our starting point the fundamental principle that every rule of municipal law is designed to govern specific internal relations by giving the provisions laid down a general effect operating both inside and outside the frontiers of the country in question.[3] The principle of the validity of rights arising out of a specific law outside the country which has enacted it is an unchallenged axiom of international law. Moreover the question of the effect of a law enacted by a particular State outside that State, or in other words the recognition of its validity abroad, must not be confused with the question of territoriality in private international law, which is more restricted. Under the latter principle acceptance or refusal to apply a foreign law is not determined by the fact that a foreign law is involved, which might not be applicable as such, but arises from the fact that under the normal rules which govern the conflict of laws, the law applicable to the specific case is the appropriate local law and not the foreign law.[4]

1 See "Record of the Discussion," *Revue Internationale de Droit Comparé*, 1958, No. 2, pp. 374–380.

2 See *Revue Internationale de Droit Comparé*, 1958, No. 1, pp. 107–108.

3 E. Frankenstein, Draft European Code of Private International Law, *Leyden*, 1950, pp. 18–19, Art. 5 (1): "The law applicable shall, unless otherwise provided in this Code, be the municipal law of the State designated by the rules of this Code." Art. 8 (1): "The validity of a foreign law shall be determined according to the law of the State or autonomous community which has enacted such law."

4 J. P. Niboyet, "Can universal rules for the settlement of conflicts be achieved on the basis of territoriality? *Revue Critique de Droit International Privé*, 1950, No. 4, pp. 510, 512, 513.

It is easier to find a reason for suspending the effect in one State of a law promulgated in another, in the "public policy" of the former, or in "international public policy." In consequence the validity of legislation about nationalisation outside the territory of the country which applies such legislation comes down to the question whether such legislation and all its provisions are consistent with the "public policy" of specific foreign States, or less restrictedly, with "international public policy." [5]

But this proposition does not in any way overcome the difficulties raised by nationalisation in the international sphere. On the contrary, these difficulties are only just beginning since nationalisation is an absolutely new institution in municipal law, and its incursion into the international field, since it touches vital interests, is viewed with misgiving for more than one reason.

Because of its practical and political character, nationalisation is an "act of higher policy" as La Pradelle says.[6] We would add, "an act of higher internal policy" by which the State undertakes the reform of the whole or a major part of its economic organisation.[7] This definition, although correct, is not a legal definition. It distinguishes nationalisation in its economic, social and political aspects. In its legal essence nationalisation is clearly an executive and legislative act belonging to the category of those which are known as "supreme executive acts" which are not subject to any judicial control. It amounts to a unilateral act which does not require the acceptance of anyone, still less the agreement of the party interested or affected.[8] It would therefore be more correct to speak of "a unilateral sovereign act." [9] The unilateral character of the act of nationalisation does not, moreover, constitute an independent quality, but arises out of the fundamental quality which it possesses of being a supreme act of government which is not subject to control by municipal law.

These essential qualities of the act of nationalisation subsist in international law because the question is in reality one of the acts of municipal law whose validity is determined in accordance with

[5] E. Frankenstein, *op. cit.* Draft Code; Art. 12 of the Draft International Convention: "The provisions of the Code do not limit the right of a member State to refuse on the grounds of public policy, retaliation or reciprocity, to apply the law of a non-member State. No member State shall, however, on the grounds of public policy refuse to apply such a law if it is substantially the same as the law of a member State whose application cannot under the provisions of the Code be refused."

[6] A. de La Pradelle, "The international effects of nationalisation," *Yearbook of the I.D.I.*, Bath Session, 1950, p. 126.

[7] Art. 1 of the Final Draft Resolutions on "the international effect of nationalisation" of the Institute of International Law, Bath Session, 1950.

[8] Ch. Hyde, *International Law* (Boston, 1947), I., p. 650: "A State enjoys an exclusive right to regulate matters pertaining to the ownership of property of every kind which may be said to belong within its territory."

[9] Art. 5 of the Final Draft Resolutions on "the international effects of nationalisation" of the Institute of International Law, Bath Session, 1950: ". . . Unilateral act of sovereignty."

such law. It follows that the question whether the act of nationalisation can in principle be recognised on the international plane does not seem open to discussion. It is in effect merged with the concept of the sovereignty of the State, which allows the State to adopt, in virtue of its own sovereign judgment, any measures which it deems appropriate for its own organisation; provided always that they do not run counter to "public international law."[10] The execution of this act must be regarded as an internal national question the settlement of which does not fall within the scope of international law since it is one of the prerogatives of the sovereignty of the State.[11]

These qualities in the act of nationalisation lead us to the conclusion that neither municipal law nor international law provides anyone who is affected by nationalisation or may be prejudiced by it with any means of opposing its introduction. In international law, however, the application of this rule is subject to a basic limitation in this sense that the sovereign will of the national legislature is limited by the rules of international law.[12] Thus the question of the status of nationalisation in international law comes down to establishing this relation and giving it concrete form. But it is clear from the outset that the consent of a party who is affected by nationalisation or prejudiced by it can have no legal effect on the validity of the act of nationalisation either in municipal or international law and can have no influence whatever on its execution. That is why it is erroneous to draw any parallel with the law of contract and to think that the opposition or the attitude of the party who is affected by nationalisation or prejudiced by it can have any legal effect on the validity of the act of nationalisation. The act involved is one which is always valid in an absolute way. It is immaterial that, as happens in the majority of cases, it modifies or suppresses legal relationships which were based on contract between the same parties, *i.e.*, the State on the one hand and the party prejudiced by nationalisation on the other.

Dealing no longer with the validity of the act of nationalisation properly so called, but with the procedure for putting it into effect, it is possible and conceivable, and has, moreover, sometimes been the case, that interested parties should be given the right of appeal against specific decisions. This right of supervision may relate to the inclusion of specific subject-matter within the scope of nationalisation, where it is contended that such subject-matter is not comprehended in the act of nationalisation, or to questions of details such as the method of nationalisation or fixing compensation. It cannot relate to the validity of the act of nationalisation, which

[10] N. R. Donan, "Postwar Nationalisation of foreign property in Europe," *Columbia Law Review*, 1948, No. 8, p. 1127.

[11] R. Bindschedler, *Verstaatlichungsmassnahmen und Entschädigungspflicht nach Völkerrecht* (Zürich, 1950), p. 24.

[12] A. de La Pradelle, *op. cit.* The international effects, p. 56.

is a supreme executive act, a unilateral sovereign act, not subject under municipal law to any control.

This incontestable character of the fundamental question of principle of the validity of nationalisation in municipal and international law is, however, merely apparent. It is in fact essential to formulate certain qualifications on this subject:

(a) It cannot be maintained from the point of view of municipal law, and still less from the point of view of international law, that the State is free to nationalise when and how it likes. In other words, it is impossible to hold that every limitation or alienation of property made by municipal legislation can be accepted as being nationalisation even if it is so described. In the first place this would be inadmissible because under municipal law the State itself limits its sovereignty by the Constitution, and in the field which interests us, and which relates to property, most Constitutions contain express provisions.[13]

It would also be inadmissible because nationalisation, in order to be regarded as such, must satisfy certain requirements, which, on the one hand, constitute its essence (ideological foundation and nature of the subject-matter) and on the other hand distinguish it from expropriation, confiscation, seizure by the State and requisition. In municipal law, as in international law, nationalisation, to be accepted as such, must relate to specific activities or property, which (1) unless they are the object of an express provision in the Constitution specifying that they are subject to nationalisation, (2) must possess a particular character, namely they must clearly be, in the country concerned, property or activities of a higher order, or in other words, property and activities which, on grounds of public policy or public welfare as well as of social justice, should not be exploited by individuals or for private interests.

(b) For a long time and right down to the present the question whether nationalisation was compatible with international law and with international public policy was looked at purely from the point of view of the violation of the rights of foreign nationals.[14] In this connection the basis is the concept of what are called fundamental rights which everyone enjoys, even outside his own country[15] and, admitting that the protection of the rights of

[13] In appreciating the constitutional basis of nationalisation, it should be noted that the new constitutions take care to determine its admissibility and its limits; *e.g.*, Art. 153 of the Constitution of Czechoslovakia; Art. 52 of the Constitution of the Saar: "Key undertakings: coal mines . . . and transport, cannot . . . be the subject of private ownership and must be operated in the public interest," etc.

[14] N. Donan, *op. cit.*, p. 1127: "No international law is involved, of course, when a sovereign government seizes the property of its own citizens. . . . When, however, foreign nationals are affected by expropriation measures, compensation is due to them according to the standard rules of international law."

[15] G. Schwarzenberger, *op. cit.* "The Protection of British Property Abroad," *Current Legal Problems*, 1952, pp. 298, 299.

property and of vested rights follows the individual outside his own country, the conclusion is drawn that international public policy is not concerned with the attitude of a State towards its own nationals, but that public policy is violated every time the property of foreign nationals is not respected.[16]

This proposition is erroneous from two points of view.

In the first place it is not without importance for international law to know whether a particular act by a given country, which is a member of the international community of States, is constitutional, and if, in general, it is consistent with municipal law. This principle finds its full application in connection with nationalisation. Thus the act of nationalisation, which merely concerns the nationals of the country which introduces it, does not leave international law indifferent. It would be inadmissible that the same act should be judged by international law according to different and possibly contradictory criteria, depending on whether it concerned foreign nationals or not. In effect, the consequence might be that, while regarded as unlawful according to municipal constitutional law, it might appear lawful according to international law, if it happened to fall within the purview of such law, so long as it merely affected the nationals of the country in question, but become unlawful and contrary to " international public policy " if it also affected foreign nationals. Quite the contrary, it must be recognised that, from the point of view of international law and international public policy, not every nationalisation is acceptable merely on the grounds that it only affects nationals of the particular country concerned; the introduction of slavery in a particular country, for example, would equally be contrary to international public policy, even if it did not affect foreign nationals. It follows that international legal practice, which tends to recognise any form of nationalisation as valid provided that it merely affects the nationals of the State which introduces it,[17] is not proceeding along the right lines.

In the second place, it is not possible to regard as satisfactory the concept that the protection of property should be different depending on whether the person concerned is a national of the State in question or a foreign national, nor to admit that international law should accord the one a defence which it refuses to the other[18]; for the rest, such a concept is, at the present stage of development, untenable if account is taken of the modifications which, from more

[16] N. Donan, *op. cit.*, p. 1127.

[17] N. Donan, *op. cit.*, p. 1129: " For instance, the court used the following language in *Salimoff* v. *Standard Oil Company of New Jersey*: ' According to the law of nations, it (Russia) did no legal wrong when it confiscated the oil of its own nationals and sold it in Russia to the defendants.' However, when nationals other than those of the expropriating State are seeking relief from nationalisation, international tribunals and national courts of many States regard the act of nationalisation as a ' justiciable ' act and not as the act of a sovereign."

[18] J. L. Brierly, *Die Zukunft des Völkerrechts* (Zürich, 1947), p. 153.

than one point of view, have supervened in the concept of property. It is nevertheless desirable to distinguish this position of principle from the question of the legitimacy of the attitude of a State which, on the plane of international law, protected the property rights of foreign nationals, or in specific cases of its own nationals, without according similar protection to native citizens.

This means that the introduction of nationalisation which rests, ideologically and morally, on a sound basis, should be recognised as conforming to international public policy even if it prejudices vested rights of property according to conceptions current in other countries. The question of compensation raises special problems.

(c) Finally, it is desirable to formulate a general qualification, namely that judgments relating to the international validity of the act of nationalisation cannot usefully be placed in the same category as though there were a common international concept of property. Because that is not the case, in our day less than ever. Moreover, a State which introduces nationalisation is not bound to adopt the conception which is held by another group of States about the legal act of nationalisation, nor to conform to that conception; it need only pay attention to the conception which is *universally accepted*. In this connection, the widest divergences which arise out of nationalisation relate to the compensation payable for the restriction or alienation of property.

It is therefore obvious that it will be necessary to examine the whole of this field for new solutions which will reconcile the extremes and take into consideration not only the external manifestations and the mechanical relationship of things, but also their essence.[19]

The manner in which the question of the validity of the act of nationalisation is raised in international life is not always logical. On the one hand it is asserted that every State has the sovereign right to nationalise[20]; but, on the other hand the State which proceeds to nationalisation must respect rights which are vested at the moment when nationalisation intervenes, and since it is about to prejudice them, it must pay full compensation in advance, as in the case of confiscation[21]; in the third place it is claimed that the

[19] From this point of view it is impossible to accept in principle the introduction of an "international treatment" as proposed by the Institute of International Law in the Final Draft Resolutions (Arts. 8, 9 and 10), especially the privileged treatment of foreigners. See the *Yearbook of the Institute*, Bath Session, 1950, p. 127.

[20] See also G. Schwarzenberger, *op. cit.*, note 15, *ante*, p. 308: "The right to nationalise. In principle every sovereign State is free to organise its own social and economic system to its own liking. This follows necessarily from the normally unrestricted freedom of independent States in matters of internal jurisdiction."

[21] R. L. Bindschedler, *op. cit. Verstaatlichungsmassnahmen*, p. 24: "The Swiss conception comes out best in the following passage from the speech of Federal Councillor Petitpierre at the Congress of Swiss Citizens Abroad held at Berne on September 6, 1947, when he said: 'It is only a question of an internal measure which a State imposes within the limits of its own sovereignty, and which we have to accept, so long as it is applied equally to domestic

act of nationalisation, like an act of confiscation, has no effect outside the country which introduces it [22]; and, finally, that the State undertaking must, as successor of the undertaking which is nationalised, honour the contractual obligations entered into by the latter.[23]

It is, however, erroneous to put the question of the international validity of nationalisation in this manner. Having regard to the elements in nationalisation which we are examining, and which we should define as *essentialia negotii*, namely the special nature of the subject-matter and the position developed with regard to property, it must be recognised, even in international law, that only an act of State which comprises these elements amounts to an act of nationalisation and that in their absence we cannot speak of nationalisation in international law. In consequence it is not possible to recognise as such, from the point of view of international law, any act which a given State described as " nationalisation " in its municipal law. On the other hand, the act which, from the point of view of international law, has the character of " nationalisation " must have the full effect of an act of transfer and transformation recognised by international law, even if compensation is not full. A conception of this kind presents four main characteristic features; (1) first, it must be recognised that the sovereign act of nationalisation can be challenged in respect of its description as " nationalisation "; (2) secondly, the act of nationalisation, once recognised as such in international law, would also extend to subject-matter situated abroad; (3) thirdly, compensation would be assessed according to the special criteria laid down for nationalisation by international law; (4) and lastly, the State which proceeds to nationalisation will find itself obliged to honour the engagements of the undertaking nationalised as they existed at the moment of nationalisation.[24]

It is inadmissible—and this is the fundamental defect in the treatment of nationalisation on the international level—that the first element in the international validity of the act of nationalisation, namely its actual introduction, should be regarded in an unduly

nationals and to foreigners. Nationalisation, *i.e.*, expropriation is, however, only admissible when the owners, whose property is about to be nationalised, are paid adequate compensation.' "

22 D. R. Edward, *Foreign Confiscation in Anglo-American Law* (New York, 1951): " If the particular nationalisation decree does not provide for, or refuses to grant compensation . . . the nationalisation law is in effect confiscatory, and the principles applicable to confiscatory decrees should apply and determine the effect. . . ."

23 Art. 5 of the Final Draft Resolutions on the International Effect of Nationalisation of the Institute of International Law, Bath Session, 1950: " Nationalisation . . . must respect engagements validly entered into whether by treaty or by contract."

24 It would be illogical to confer such a scope on nationalisation in respect of obligations to foreigners and at the same time to limit its territorial scope: see Art. 5 of the Final Draft Resolutions of the Institute of International Law, Bath Session, 1950.

broad way and with little critical spirit, as a matter of municipal law and as being a manifestation of sovereignty; with regard to the second element in its validity, namely the payment of compensation for vested rights which are prejudiced, it is equally inadmissible that the solution should be borrowed unduly from the institution of compulsory acquisition of the traditional type or from that of confiscation, without taking into account the fact that nationalisation is an original act comprising specific characteristics, including those relating to the basis of compensation.

The position of municipal law with regard to the scope of the act of nationalisation is categoric and unanimous. According to municipal law the act of nationalisation embraces everything which forms part of the subject-matter of the nationalisation regardless of its nature or the place where it is situated. Constituting, in municipal law, a " supreme act of government " nationalisation falls entirely within the sphere of the public policy of the State which introduces it, and no distinction is drawn between the persons affected [25] according to whether they are nationals of the State concerned or foreign nationals.

On the other hand, the position of international law with regard to the territorial effect of the act of nationalisation differs. The most commonly accepted point of view is that its effect is limited to the frontiers of the country which introduces it.[26] This view, however, merely represents an expedient designed to meet practical necessities. It is a reaction against the radical transformations carried out abroad and an attempt to repair, through a compromise, the economic injustices which result from them. The legal practice which is tending to emerge in relation to new cases of nationalisation resorts to two weapons in the fight against the international effect of nationalisation, namely, the principle of territoriality and public policy. These are, however, merely means of defence which, because of the manner in which they are employed, take on a political colouring. The " right of veto " for example, in the recent practice of UNO takes on the aspect of a political institution. That is why the jurisprudence relating to the territorial effect of nationalisation, based on territoriality and public policy, the purpose of which is to confine the effect of nationalisation to the frontiers of the State which introduces it, has only a very restricted theoretical creative value. It does not resolve the conflict in principle,

[25] R. Savatier, *Proceedings of the French Committee on International Private Law* (Paris, 1951), p. 51.

[26] See, *e.g.*, P. Guggenheim, " Referat über Völkkerrecht," *Swiss Yearbook of International Law*, 1949, Vol. VI, pp. 124–125; D. Schindler, " Besitzen konfiskalorische Gesetze, ausserterritoriale Wirkung? " *Swiss Yearbook of International Law*, 1946, Vol. III, p. 68; W. Schaumann, " Ausländische Konfiskationen, Debisenkontrolle und Public Policy," *Swiss Yearbook of International Law*, 1953, Vol. X, pp. 131 *et seq.*; *Gewerblicher Rechtschutz und Urheberrecht*, 1957, No. 3, pp. 128–130; see the criticisms by R. Sarraute and P. Tager in " Hier et aujourd'hui, les effets en France des nationalisations etrangères," *Journal of International Law*, 1952, pp. 540 *et seq.*

but tries to find an equitable solution in each specific case.[27] This point of view is open to criticism for two reasons. First of all, it rests on a confusion between the institutions of confiscation and nationalisation, or more precisely, it deals with nationalisation without compensation, or without adequate compensation, which cannot be accepted. Secondly, it is devoid of logic, since it regards it as established *a priori* that nationalisation in respect of which full compensation is not paid in advance is inconsistent with public international law, whereas that is a question which cannot be determined in advance, but must be solved in each specific case, since nationalisation, while not excluding the principle of compensation, simply claims that it must be fixed by new criteria.

It must nevertheless be recognised that in present circumstances this attitude as to the territorial effect of nationalisation is losing ground. Some people no longer accept it unreservedly,[28] while others are inclined to reject it.[29]

For the reasons we have given above we think that nationalisation, being different from confiscation as well as from compulsory acquisition (expropriation), is entitled to demand that the question should be reconsidered in the light of its own particular attributes, without having solutions applied which were conceived for confiscation or expropriation.[30] It does not seem, however, that the elements of this important question are correctly understood, when people, while expressing the desire to regulate the international status of nationalisation, carefully avoid letting it embrace subject-matter situated outside the frontiers of the country which introduces it.[31] This is a contradiction in terms. Similarly we could not allow ourselves to see this problem developing towards a limitation of the

[27] D. Zweigert, *Die Dritte Schule in internationalem Privatrecht, Festschrift fur Leo Raape* (Hamburg, 1948), p. 51.

[28] R. Roblot, "La politique des nationalisations et le droit international," *Droit Social*, 1949, No. 2, p. 48: "Hence in certain respects, a less definite sense and a less energetic assertion of the prerogatives of the former proprietors outside the frontiers of the State which carries out the nationalisation"; subject to the reservation that there is no question of confiscation, but of compulsory acquisition without compensation; see also G. Beitzke, *Probleme der Enteignung im Internationalprivatrecht, Festschrift für Leo Raape* (Hamburg, 1948), p. 110: "The principle has been laid down in recent writings that, in contrast to confiscation, expropriations against compensation have effect also even in the case of property situated abroad. . . .": M. Wolff, *Private International Law*, s. 538. He describes this as "a new rule of private international law"; this would be "sound and satisfactory." See also the observations concerning judicial practice by R. Sarraute and P. Tager, *op. cit.*, p. 540: "We have seen what the reply of the French Court of Cassation was to this question. The expropriation of property by a foreign State without preliminary and adequate compensation has been regarded as inoperative and incapable of conferring, either upon the State itself or its successors in title, a valid title outside its own frontiers. It must, however, be recognised that on this point French jurisprudence remains entirely isolated."

[29] G. Beitzke, *op. cit.*, p. 96.

[30] N. R. Doman, *op. cit.*, p. 1158.

[31] See the detailed discussions of the Institute of International Law, at its Bath Session (1950), *Yearbook*, 1950, I, pp. 42–132.

effect of nationalisation abroad.[32] Quite the contrary, an effort must be made to establish a clear and concrete system for the international legitimation, or in other words the international recognition, of nationalisation. But once this object is achieved, it becomes indispensable and logical to recognise the international scope [33] of any act of nationalisation which satisfies the requirements of municipal law as well as international public policy.

Konstantin Katzarov.*

[32] R. Savatier, *op. cit. Proceedings of the Committee*, p. 531: "A State can only nationalise those undertakings which have their place of business within its territory"; see Art. 4, 8–10 of the Final Draft Resolutions on the International Effect of Nationalisation, Institute of International Law, Bath Session, 1950.

[33] J. E. S. Fawcett, "Some foreign effects of nationalisation of property," *The British Yearbook of International Law*, 1950, XXVII, p. 375: "It may be suggested then in conclusion that . . . 3. where property is situated in England, its transfer is governed prima facie by the *lex situs*, but may be governed by the *lex actus* of a foreign nationalisation decree; (a) where, having regard to all the circumstances, the court considers the foreign law to be the proper law of the transfer; and (b) provided that there is no penal element in the foreign law which would be contrary to English public policy."

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STATUTES

Nuclear Installations (Licensing and Insurance) Act, 1959

When the nuclear energy age burst in upon our world eighteen years ago all the work was focused upon the potential military uses of this new source of energy. It was not until 1945 at the cessation of hostilities that this country turned its attention to the civil applications of nuclear energy and embarked upon long-term prospects for supplying the country with an alternative method of power-production.

Legislation in the field of nuclear energy was called for initially to ensure effective control by the Government over all fissionable materials; hence the Atomic Energy Act, 1946, and the Radioactive Substances Act, 1948. The immense potentialities of this new form of electrical power led inevitably to the creation of a novel type of public corporation. The nuclear power field had become too vast for a government department (it had been under the Ministry of Supply); what was needed was the combination of the freedom and flexibility of an industrial enterprise yet the retention of the reins of control by the Government to guard the secrets of nuclear energy's military aspects. Hence the creation of the Atomic Energy Authority under the Atomic Energy Authority Act, 1954.

Up to this stage the lawyer in private practice was rarely called upon to consider this new field of legislation. But with the advent of the building of nuclear power reactors by industrial firms and the projected ownership of these power-plants by the Central Electricity Generating Board as well as ownership of research reactors by a few enterprising public and private companies, the lawyer and the legally trained administrator were called into action.

Against this background of swift advancement into a new field of industry the Nuclear Installations (Licensing and Insurance) Act, 1959, was passed on July 9, 1959—no Order in Council has yet been made bringing the Act into force (s. 14 (2)).

The Act deals conveniently with three distinct aspects of the regulation of nuclear power sites, namely, licensing of nuclear sites (ss. 1–3 and 6–8), compensation for any damage to person or property from any ionising radiation (s. 4) and a scheme of compulsory insurance (s. 5). While licensing, as the preventive element in this piece of legislation, rightly demands the wholetime attention of the administrator it is the other (curative) aspects which will more frequently engage the lawyer's attentions.

A new creature of statutory duty has been devised, without specifying the precise ways in which that duty is to be exercised (as in the Factories Act, 1937); the creature becomes little short of

being an absolute liability. What is particularly novel in this instance is the channelling of that liability to one person (s. 4 (2)) the reactor-owner and licensee, to the exclusion of any liability in any other person who may have provided, for example, a *novus actus interveniens* or been the contractor providing faulty workmanship in constructing the reactor.

The Act provides that a licence will be granted, subject to certain conditions concerning the way in which a reactor is operated (s. 1). It is the licensee's (reactor-owner's) duty to secure that no ionising radiations, emitted during the period of his responsibility from " anything caused or suffered by the licensee to be on the site or from any waste discharged on or from the site," cause any hurt to any person or any damage to any property, whether that person or property is on the site or elsewhere (s. 4 (1) (*a*)). This liability attaches to the site licensee, moreover, where there is an emission from any irradiated nuclear fuel during transportation within the United Kingdom (s. 4 (1) (*b*)).

A curious restrictive provision in the Act follows up the liability for transported nuclear fuels. The Act provides (s. 4 (3)) that the licensee's liability shall continue where the nuclear fuel is on board a ship or aircraft outside territorial waters but only where that ship or aircraft is registered in the United Kingdom. The Government, on the Bill's Committee stage, contended that to extend the liability where the fuels were on board any foreign registered ships or aircraft would be to derogate from our liabilities under international conventions, as enacted respectively in the Carriage of Goods by Sea Act, 1924, and the Carriage by Air Act, 1932. The Government seem unnecessarily alarmist about extending the liability. The liability sought to be attached in the case of a foreign registered ship or aircraft outside British territorial waters is a liability on the licensee of a nuclear site in the United Kingdom and not in any way a liability on a foreign ship's master or shipowner.

The only defence expressly available to a licensee for any damage arising from emissions of ionising radiation is where the damage is " attributable to hostile action in the course of any armed conflict, including any armed conflict within the United Kingdom " (proviso to section 4 (1)). Are acts of God excluded as a defence? The other defences available in the strict liability enunciated in the *Rylands* v. *Fletcher* rule are clearly excluded by the Act (s. 4 (2)). But presumably the defence of contributory negligence still applies.

There are two restrictions upon the exaction of absolute liability against the licensee. The first is that a monetary limit is placed on the licensee's liability (proviso to section 4 (4)) and elaborate (not altogether easily understandable) provisions for applying a period of limitation (s. 4 (4)).

The licensee, as a condition of the granting of the licence, will be obliged to provide security up to an aggregate amount of £5 million

(s. 5 (1)). In practice, this security will be likely to be in the form of insurance; indeed, the amount of this upper-ceiling of liability was arrived at after consultation between the Government and the London insurance market. The security must be provided for a period of ten years in respect of any one installation. Beyond that figure although liability exists, and a claim may be made, the licensee need not meet any such liability. Claims totalling more than £5 million would indicate a national disaster. The licensee does not have to satisfy any such claims unless or until Parliament has made provision to reimburse him in a form determinable by Parliament (proviso to section 4 (4)).

The second restriction upon the licensee's liability is the period of limitation (s. 4 (4)). The nature of the risk involved in nuclear energy made it clear that the established three-year limitation period was too short. Neither was Parliament willing to remove the limitation period altogether. The obvious period to choose was one which coincided with the period of insurance coverage, namely, ten years. In fact the choice of the period of limitation governed the period of insurance coverage rather than the other way round. The Government adopted ten years as the statutory period so as to conform with the third party liability convention at present being drafted by OEEC and to which the British Government is likely to accede. But during the Bill's passage through Parliament there was a strong urge to increase the limitation period to thirty years. A compromise was achieved; a claim against a licensee will not now be barred by a plea of limitation until after thirty years from the relevant date ("the date of the occurrence on, or in connection with the use of, the site in question which gave rise to the claim"), but no settlement of a claim of more than ten years' standing need be made by the licensee until Parliament decides how he shall be reimbursed.

This is a highly complicated—and at times an ill-drafted—piece of legislation. But it succeeds in achieving a harmony of interests of the public, that of the individual who needs to be protected and (where necessary) compensated and that of the reactor-owner who must not, in the interests of the general public, be stultified in carrying on a new industry by too many regulatory inhibitions.

This is the first country which has legislated for the licensing and control of private ownership in and operation of nuclear power reactors; only Germany and Switzerland have comparable legislation on the stocks. Britain has led, not always successfully, in the field of nuclear power; she has at least kept her legislation and administration abreast of scientific advancement and provided a model code for the peaceful aspects of nuclear energy.

L. J. Blom-Cooper.

REPORTS OF COMMITTEES

Lister *v.* The Romford Ice and Cold Storage Company, Ltd.

(Report of the Inter-Departmental Committee)

The broad effect of the decision in *Lister* v. *Romford Ice & Cold Storage Co., Ltd.*[1] is well known. Briefly it is that an employee is liable to indemnify his employer in respect of damages paid by the latter to a third party injured by the former's negligence. Judgment was given by the House of Lords on December 20, 1956. In March 1957 the Minister of Labour appointed an Inter-Departmental Committee "to study the implications of the judgments in the case of *Lister* v. *Romford Ice & Cold Storage Co., Ltd.*, as they might affect the relations between employers and workers." The Committee, which consisted of representatives of the Ministries of Labour, Transport and Power, the Lord Chancellor's Office and the Treasury Solicitor's Department, met on eight occasions. In the course of its work the Committee sought the views of a number of bodies, including Lloyd's, the British Insurance Association, the British Employers' Confederation and the Trades Union Congress. Its report was published early this year.

In order to appreciate the scope of the Committee's inquiry and the validity of its conclusions it is necessary to consider the facts of *Lister's* case. They were somewhat unusual. In January 1949, Lister, a lorry driver employed by the Romford Ice & Cold Storage Company, reversed his employer's lorry in a private yard and knocked down and injured his father, who was also employed by the company, and was acting as his mate. In June 1951, Lister senior issued a writ against the company claiming damages for personal injuries suffered as a result of Lister junior's negligence for which the company as his employers were vicariously responsible. The court held that the relative responsibility was two-thirds that of Lister junior, and one-third that of Lister senior. The damage was assessed at £2,400, and judgment was entered for Lister senior for £1,600, two-thirds of that amount, and costs.

In 1953 the company's insurers, by exercising their rights of subrogation, and without obtaining the consent of the company, successfully brought an action against Lister junior in order to recover the damages and costs which they had paid under an employers' liability policy. Lister junior appealed to the Court of Appeal, where his counsel's argument found favour only with Denning L.J. (as he then was). Subsequently Lister junior appealed

[1] [1957] A.C. 555; [1957] 1 All E.R. 125.

to the House of Lords where the appeal was dismissed by three votes to two (Viscount Simonds, Lords Morton and Tucker forming the majority; Lords Radcliffe and Somervell dissenting).

An important feature in *Lister's* case, which distinguishes it from many other industrial accident cases, is that Lister junior was a motor-driver. To use Lord Radcliffe's words:

> "... the critical point is that we have to deal with an employment which it was illegal for the employer to authorise or for the employed to pursue unless insurance cover had been provided against third-party liability."

It was the existence of a policy of insurance which enabled Lister junior's counsel to argue that there was a term in his contract, to be implied, that he would receive the benefit of any contract of insurance effected by his employers and covering their liability in respect of the action brought by his father. This implied term was upheld by Denning L.J. and subsequently by Lords Radcliffe and Somervell. The majority in the House of Lords felt themselves unable for a variety of reasons to accept the implied term. The reason advanced by Lord Morton is one of considerable force. As he said, to imply any such term would mean that:

> "insurers who had paid the employer in a case of this kind would be deprived of their right of subrogation by reason of an implied term in a contract to which they were not a party."

The rejection of the doctrine of the implied term leads to a curious result, as Lord Radcliffe observed. If an injured third party brings his action against a motor-driver employee, the master's insurance policy relieves the employee of pecuniary loss. If, however, the third party fires his shot at the master, then the latter's insurers can use their right of subrogation to recover from the employee. This anomaly illustrates the present unsatisfactory state of the law. Yet, in its conclusions the Inter-Departmental Committee was not of the opinion that there was any pressing need for a legislative reform.

The Committee found that in practice the number of actions where employers (or their insurers) sought to indemnify themselves by recourse against employees, was negligible. In the last twenty years the reports only reveal four such cases, apart from *Lister's* case. In addition, the Committee came to hear of one High Court and one county court case, each unreported, on similar lines. And it was learned that the National Coal Board, which carries its own insurance, has infrequently brought proceedings against employees guilty of gross negligence; but in these cases there was a special circumstance: it is the policy of the Board to enforce strictly compliance with Mining Safety Regulations.

It emerged that as long ago as 1953 certain members of the British Insurance Association engaged in the employers' liability market entered into a "gentleman's agreement" under which

they undertook that claims would not be instituted against the employees of an insured employer in respect of damages paid to a fellow employee without the prior consent of the employer. The only exception made to this agreement is where it transpires that there has been collusion or *wilful* misconduct by an employee. Information received by the Committee showed that this agreement is accepted by the great majority of insurers in the employers' liability field and by those underwriters at Lloyd's who specialise similarly. In 1955 the British Employers' Confederation approached the representatives of the Accident Offices' Association and of the Mutual Insurance Companies' Association for an assurance that rights of subrogation against an employee would not in future be used without the employer's consent. This assurance was given. Further, it appears that nationalised industries, with the exception quoted, and public authorities do not as a matter of policy either themselves recover or permit subrogation against their employees. This being the state of the evidence, the Committee concluded that it did not "feel that the House of Lords' judgment in the *Lister* case has exposed a practical problem."

It is not clear that the Committee realised that the "gentleman's agreement" leaves it open to the insurers to say to a trade union, "If you go on with this action on behalf of your injured member, and we choose with the consent of the assured to claim over against the foreman whose negligence is alleged to have caused the injury, the foreman, who is also one of your members, may have to sell up his home."

There is an additional risk to which an employee is exposed in certain circumstances. While most employers either have sufficient capital or else insure themselves against liability to the public arising out of the accidents, there are firms that are either too insouciant or too harassed to bother to insure; small builders are a typical example. Not only do building operatives stand the risk of being unable to recover if they are injured due to their employers' negligence; they may themselves be brought to court by an injured third party who discovers that their employer is not worth "powder and shot." Considerations such as these led the Trades Union Congress to suggest a change in the law to the Committee.

The practicability of compelling employers to insure was rejected by the Committee. It is unfortunate, perhaps, that the Committee did not see fit to give its reasons to support this conclusion. The report simply states that the idea of compulsory insurance was considered unworkable when it was mooted at the time of the passage of recent laws to promote safety in mines, quarries and farms.[2] The Committee did, however, lend its support to two possible patterns of legislative change. The first would

[2] The Mines and Quarries Act, 1954; Agriculture (Safety, Health and Welfare) Act, 1956.

provide that, where an employer has in fact insured himself against a third party risk the policy should inure to the benefit of the employee to the extent to which the employee is, under the law as it stands, under any liability in respect of any act or omission which may make his employer liable to a claim which is covered by the policy. The Committee itself preferred a second formula. Legislation could be passed to vary to such an extent as might be thought suitable the legal relationship between an employer and an employee so as, (i) to prevent the employer from claiming an indemnity against the employee for the consequences of negligence by the latter in the course of his employment, and possibly also (ii) to require the employer to indemnify the employee against any liability the latter might incur to third parties for such negligence. As might be expected, the T.U.C. also prefers the second proposal.

The Committee, having endorsed these two proposed law reforms, did not shirk from the duty of pointing out the objections. The first objection is that it might appear to many to be socially undesirable to introduce a statutory exemption relieving an employee from the liability to be careful. The second is that there would be difficulty in deciding whether the exemption should apply to all forms of employment, especially whether it would be right to exempt those salaried employees who are either well enough off to face the consequences of their own negligence, or else in a walk of life where it is accepted prudence to insure themselves. The lack of pressing practical need and the validity of the objections left the Committee minded not to press for legislative reform.

Instead, the Committee recommends alternative action. It expresses the view that negotiations might be started to enlarge the ambit of the "gentleman's agreement." At present this only extends to the employers' liability market, and does not even cover all insurers in that market. Information received by the Committee suggested that it might be possible to secure virtually universal acceptance of the agreement. Important as such an advance would be, it does not, it must be emphasised, cover the case of the employee whose master is not insured.

The second line of action recommended is especially interesting. It is that trade unions might seek by collective bargaining agreements to secure insurance cover for their members, the cost of which would be borne by the employers. Although the report does not refer to the practice of United States unions, it is a fact that several of the more progressive unions have secured great benefits by way of contract in the field of industrial safety. British unions have traditionally preferred to use their political influence to secure protection for their members from the State, instead of taking advantage of their economic position to obtain contract benefits from the employers. A change of emphasis might take some little time to develop. Nonetheless, if it is really the case that compulsory

employers' insurance is impracticable, the trade unions may come to realise that skilled contract bargaining may not only yield better results for their members, but also provide a strong reason for workers to join the union, for non-members would be uninsured.

There have been two or three previous cases (*e.g.*, the standard conditions of laundries, and arbitration clauses in insurance policies) in which, where some reform of the law seemed desirable, the solution adopted has been the making of a gentleman's agreement with the trade interests concerned that they will not enforce their legal rights. It may be doubted whether, on general grounds, this rather peculiar method of law reform should be encouraged.

Gerald Gardiner.

NOTES OF CASES

Co-operative Competition

I

The legal nature of the Co-operative Union, Ltd., and, more importantly, the legality and legal effect of its arrangements to determine inter-society boundary disputes came before the English High Court in *Birtley and District Co-operative Society, Ltd.* v. *Windy Nook and District Industrial Co-operative Society, Ltd. (No. 2)*.[1] Shortly afterwards, the legality and legal effect of the Union's boundary rule were also considered by the Inner House of the Court of Session in Scotland in *Bellshill and Mossend Co-operative Society, Ltd.* v. *Dalziel Co-operative Society, Ltd.*[2] The intrinsic interest of the subject-matter of these cases is sharply enhanced by the fact that the judgments in the English and Scottish courts are in direct conflict with each other, and that the Scottish decision is, with respect, much to be preferred.

The Co-operative Union, Ltd., is an incorporated society registered under the Industrial and Provident Societies Act, 1893. Those of its rules at issue in the two cases run as follows:

> "2. The objects of the Union are to carry on the trades and businesses of accountants, booksellers, commercial and general advisers, publishers and arbiters in matters of dispute arising between societies which cannot be settled locally.
>
> . . . . . .
>
> "9. Each applicant for admission shall be deemed by such application to accept as the principles by which all its business transactions shall be guided—the desire to promote the practice of truthfulness, justice and economy, in production and exchange—
>
> (3) By preventing the waste of labour now caused by unregulated competition.
>
> . . . . . .
>
> "10. . . . No society shall be allowed to remain in membership with the Union which does not abide by its rules, conform to its aims, and accept the decisions of the central executive confirmed by congress. Any disagreement that may arise as to overlapping or any other matter which cannot be settled in consultation between the parties shall, in failure of conciliation, be submitted to persons appointed by the Co-operative Union, Ltd., as arbitrators and their decision shall be final and binding on all parties.
>
> . . . . . .

[1] [1959] 2 W.L.R. 415.
[2] 1959 S.L.T. 150: on appeal from and reversing Lord Guest in the Outer House.

> "15. (1) A society may withdraw from the Union by notice in writing. . . ."

The inter-society dispute in England occurred in the Washington Urban District in County Durham. The Urban District is divided into five wards: Washington, Washington Station, Usworth Colliery, Great Usworth and Springwell. In the first three, Birtley ran the only co-op shops; Windy Nook was the only co-op trader in Springwell. For a time, Great Usworth lay between them as a kind of no-man's land from which customers would come to the shops of both societies in the adjoining wards. Then, a new building estate rose on Great Usworth Ward and both societies successfully applied to the Washington Urban District Council, who allotted them one shop each in the new shopping block.

Birtley, who regarded themselves as the paramount co-op traders in the Washington area as a whole, claimed they had an exclusive right to afford co-operative service there with the sole exception of Springwell; and, attempts at voluntary negotiation with Windy Nook having broken down, they invoked the procedure of compulsory arbitration under rule 10. Windy Nook boycotted the arbitration, but, in their absence an award was made in favour of Birtley, confining Windy Nook to trade in Springwell alone. Windy Nook refused to recognise the award. On proceedings being commenced against them, Windy Nook terminated their membership of the Co-operative Union, Ltd. Streatfeild J. was asked for a declaration that the award did legally bind Windy Nook, although no longer a Union member, for damages and for a perpetual injunction to restrain the dissentient society from continuing to trade in Great Usworth Ward.

The circumstances in the Scottish case were, in all substantial respects, the same.

Three legal issues were considered by the English court, two of which, as will be indicated, received the attention of the Scottish court also.

(1) The restraint of trade issue.

Under section 22 of the 1893 Act, the rules of registered societies form a contract among the *pro tempore* members. Windy Nook argued that the compulsory arbitration rule directed towards the fixing of trade boundaries was a contractual clause in unreasonable restraint of trade at common law. Streatfeild J. held against the defendant society for two main reasons:

(a) Rule 10 itself restrained no one: only an arbitrator's award under rule 10 did so, and this was, as it were, outside the contract. Thus the English judge.

The Scottish court was of the contrary and, in my respectful view, the better opinion. Rule 10 provides machinery through which the principles of non-competition of the Co-operative Union, to which all member societies adhere, may be given expression; the

arbitration clause looks to the division of trading territories through arbitration when disputes arise. As the Lord President of the Inner House, Lord Clyde put it: " that award is merely crystallising in a particular case and by means of a Union tribunal the general principle which governs the operations of the members of the Union." [3]

(b) But, Streatfeild J. went on to consider the common law position if rule 10 were conceded to be equivalent to a contract to divide up trading territories. Even then, the learned judge held that it would not be an unreasonable restraint of trade as between member societies and in relation to the public interest. The Co-operative Union were:

> " not seeking to defeat competition generally; indeed they have many other ordinary shopkeepers in the district who compete with them. They are only seeking, within the principles of the co-operative movement, to protect themselves and their customers (the public) from the waste of labour caused by unregulated competition within the co-operative movement itself, by securing stability in their list of customers in a particular area." [4]

Even on the assumption that the arbitral award bound Windy Nook in perpetuity, which, as we shall see, is the conclusion Streatfeild J. reached, the award, *qua* restraint of trade contract, still was not unreasonable. Windy Nook was not excluded from doing business at all and so did not stand in the same position as the complaining parties in *Hylton* v. *Eckersley*,[5] *Evans* v. *Heathcote*,[6] and *M'Ellistrim* v. *Ballymacelligott Co-operative Society* [7]: only Great Usworth Ward was the forbidden territory. In its unreluctant acquiescence in restraint on competition, Streatfeild J.'s decision stands in unbroken lineal descent from *Hearn* v. *Griffin*.[8]

The reasonableness of a restraint of trade clause is, in law, a question of public policy which depends, theoretically, in each case on the value judgment the particular court makes. The Court of Session regarded restraint of competition even by and within the co-op movement more severely:

> " The only justification for the restriction . . . is that competition is contrary to the pursuers' and the Union's principles of co-operative trading. Even if proved this would not . . . constitute a justification in law for the court's enforcing this restraint of the defender's trading activities. It comes very near to saying that the justification for the restraint is that competition is bad in principle." [9]

3. 1959 S.L.T., at p. 158.
4. [1959] 2 W.L.R., at p. 422.
5. (1855) 6 El. & Bl. 47.
6. [1918] 1 K.B. 418.
7. [1919] A.C. 548.
8. (1815) 2 Chit. 407.
9. *Supra*, at p.159.

The boundary agreement of the Co-operative Union is on the Register of Restrictive Trading Agreements, and—unless abandoned —will in due course have its validity scrutinised by the Restrictive Practices Court.

Economic arguments relevant to the position both at common law and under the 1956 Act are reviewed in his comment below by Mr. Yamey.

(2) The " trade union " issue.

It was argued, to a somewhat illogical end I believe, by Windy Nook that the Co-operative Union was incorrectly registered under the 1893 Act since it is, in law, a " trade union " within the meaning of the Trade Union Acts, 1871–1913.

This argument was pressed because, if the Co-op Union were held to be a " trade union," section 4 (1) of the Trade Union Act, 1871, would apply to its rules, and, so far as those rules constituted an agreement among the member societies " concerning the conditions on which . . . members for the time being . . . shall . . . transact business," [10] such rules would not be directly enforceable in a court of law. However, the wording of sections 3 and 4 of the 1871 Act is such that section 4 (1) applies to a " trade union's " rules only if those rules are considered to be in unreasonable restraint of trade at common law. Since Streatfeild J. held otherwise on the restraint of trade issue, section 4 (1) could not apply; but, on the other hand, had rule 10 been held to be unlawful at common law, so tainting the award, the applicability of section 4 (1) would then have been superfluous.

Be this as it may, in fact the learned judge held that the Co-op Union is not a " trade union " in law. Though one of its objects is " imposing restrictive conditions on the conduct of any trade or business," [11] this is not its " principal " object under its rules. The " trade union " issue was not raised in the Scottish case. Was it because Scottish lawyers are notoriously logical?

(3) The perpetual award issue.

There is nothing in the Arbitration Act, 1950 (which, in the present respect, does not extend to Scotland), that lays down the scope and duration of an arbitral award. This depends, in my opinion, in England as in Scotland, on the interpretation of the agreement in which the arbitration clause is " embedded."

Without any real consideration of the contractual limits of the award, Streatfeild J. held it binding in perpetuity on Windy Nook, despite their non-membership of the Union, by analogy with the resale price maintenance case of *Palmolive Co. (of England)* v. *Freedman.*[12] With respect, there is a world of difference between maintaining the price of a tablet of soap and excluding a trader forever from a particular area of business. If any clear reason is to be

[10] Trade Union Act, 1871, s. 4 (1).
[11] The wording in the Trade Union Acts, 1871–1913.
[12] [1928] Ch. 264.

found in the judgment of the English court, it is that co-op principles of trading require this particular result.

The Scottish court, however, took a different view of the nature of the purposes of the Co-op Union as revealed in its contractual rules. As the Scottish judges saw it, adherence to co-op principles is a voluntary matter under the Union's rules and is not to be required of any society which, by withdrawal from membership, signifies its desire no longer to be subject to those principles. This appears, in my opinion, to be a fair and true interpretation of the relevant rules, which permit a member to withdraw, which, indeed, require a member's exclusion if it will not conform with the Union's principles and which, in providing for boundary disputes, clearly refer to "members," *i.e.*, continuing members, when they refer to the "parties" to the dispute. Moreover, to hold an award binding on an ex-member society for all time might lead to extremely unjust results:

> "The consequence would be that if the Union were dissolved and the ideal of non-competitive co-operative trading ceased to have any adherents in the movement, the defenders would still continue subject to the trading restraints in the award. . . . Or again if the pursuers left the Union they would be free to trade in the defenders' existing territory in Motherwell while retaining their monopoly in the disputed area in Bellshill." [13]

The *Birtley* case was cited, on the legal effect of the award as in other respects, to the Court of Session. Lord Clyde observed:

> "In the recent case of the *Birtley and District Co-operative Society* v. *Windy Nook and District Industrial Co-operative Society*, a different view of rule 10 was taken. In that case the arbitration clause in rule 10 was treated as standing by itself quite independent of the other rules and in particular rule 15 (1), and because it was a rule applicable to a co-operative society it was construed as akin to a statutory obligation and not as an obligation arising under an ordinary commercial contract. I do not feel able to accept such a distinction between co-operative and other trading activities. I see no legal basis for it." [14]

And neither, with respect, do I.

C. Grunfeld.

II

"An axiom of the [co-operative] movement is 'one area—one society.'" "Co-operative policy . . . is to avoid overlapping, so that when two societies adjoin it is necessary to fix a boundary and to ensure its observance." [15] Is this policy (and the resultant system

[13] *Supra*, at p. 158.
[14] *Ibid.*
[15] A. M. Carr-Saunders *et al.*, *Consumers' Co-operation in Great Britain*, revised edition, 1942, pp. 63, 80.

of boundary demarcation agreements and arrangements) in the public interest? The *Birtley District* case, on the legal aspects of which Mr. Grunfeld has commented in the preceding note, raises this question in the narrow context of the common law doctrine of restraint of trade, and in the judgment the discussion of the economic implications of the policy and its implementation is sketchy. A fuller and more questioning examination of the economics of the policy may be expected when the Restrictive Practices Court comes, in due time, to consider restrictive boundary agreements and arrangements in co-operative retailing.[16] Within the field of co-operative trading, these agreements are a species of market-sharing agreements, a class of restrictions which has not yet been considered in a case before the court.[17]

Boundary demarcations, where effective, create a series of adjacent local monopolies in co-operative retailing. The disadvantages to consumers in this sector of retailing are those generally associated with monopoly: one spur to efficiency—the competition of another co-operative society—is absent[18]; and consumers have no choice of co-operative suppliers—they have, as co-operators, to take or leave the services of the single society. The second point is of special significance. A co-operative society can have only one policy relating to each of such (partly inter-related) variables as price and dividend levels, range and variety of goods stocked, and quality and amount of retail service (of which the number and location of branch shops and mobile vans and the frequency of delivery services are important aspects). Not all co-op-minded people have uniform preferences and requirements in respect of these matters. Hence the policy adopted by a particular society will attract or estrange different people in varying degrees. A single monopolist co-operative society cannot cater equally well to the needs of all co-op-minded people within its borders, and the unsatisfied or less satisfied members are denied access to other co-operative suppliers who might have been willing and able to meet their needs more satisfactorily.[19] The fact that when there is a breach of the

[16] Boundary agreements and arrangements appear to be registrable under the Restrictive Trade Practices Act, s. 6 (1), being agreements under which restrictions are accepted by two or more parties in respect of "the areas or places in . . . which goods are to be supplied."

[17] The Monopolies Commission did not have before it any example of a market-sharing arrangement demarcating exclusive trading regions within the home market.

[18] Boundary agreements "might actually be more undesirable than the competition which ensues from overlapping. They may protect and encourage sloth and stagnation, whereas competitive penetration by a more vigorous into a more indolent society's area might inspire the latter to greater efforts . . .": *Co-operative Independent Commission Report*, 1958, p. 81.

[19] Here are two examples of differences in consumers' interests as affected by the policies of societies. The Webbs, writing in 1921, suggested that societies did not cater to the needs of the "poorer labourers" in such matters as quality of goods, services and level of prices and dividends (S. and B. Webb, *The Consumers' Co-operative Movement*, 1921, p. 316). The recent *Co-operative*

monopoly, as in the reported case, each of the co-operative societies secures some customers, illustrates this general point. The finding of Streatfeild J. that " the plaintiffs are financially able to provide exclusively the co-operative needs of the (disputed) area " does not take cognisance of the fact that co-op-minded people do not have uniform needs and preferences, and that whatever a particular society does, some co-operative needs will be satisfied more fully than others.

Of course, private retailers do compete with co-operative societies, and do offer a range of choice of retailing policies and practices to consumers, including co-op-minded ones. This competition considerably reduces the practical effects of the adverse side of co-operative regional monopoly. An inefficient society will lose business, and disgruntled co-operators will turn to private retailers. Indeed, in some areas boundary arrangements may well have " no substantial economic significance," and may be fit candidates for removal from the register of restrictive agreements.[20] However, the checks and safeguards provided by private retailing are obviously not " co-operative " or provided by the co-operative " movement." [21] To that extent, the restrictions, it could be argued, reduce the satisfactions of co-op-minded consumers. Moreover, in areas where the co-operative society may be in a dominant position in the market, the restraints may more materially injure the interests of co-operators and, by offering less effective competition to private retailers, those of other consumers as well. But it is doubtful whether this is important in practice.

The case usually made for the establishment of regional monopolies in co-operative retailing is that this avoids wasteful overlapping and duplication of facilities (*e.g.*, delivery vehicles and shops) and that it allows each monopolist society to attain the full economies of scale in its area. In general terms the case is weak. Facilities which are not always fully used are not conclusive evidence of waste. They may represent more adequate catering to variegated requirements and provide the service of availability. Again, even if a monopolist society has access to economies of scale within its area, the absence of co-operative competition may weaken the drive to secure economies. In any case, any achievement of a reduction in costs occurs at the expense of the limitation of co-operators' choice. Moreover, boundaries may prevent some societies from expanding to their optimum scale, and force others to attempt to operate beyond the optimum scale.

Independent Commission Report (p. 47) refers to " the Co-operative bias towards the older woman shopper, and the relative failure to attract the heavy-spending teenage and younger woman."

[20] In terms of Restrictive Trade Practices Act, s. 12.

[21] A boundary agreement cannot bind a co-operative society not subject to it, *i.e.*, in practice, not a member of the Co-operative Union. In fact there are few such societies, which are, in any case, cut off from the " co-operative movement."

But even if it were found in a particular case that the removal of a boundary agreement and the ensuing development of co-operative competition could be expected to result in a substantial increase in costs, it is suggested that it may be difficult to bring this as a defence of the agreement within section 21 (1) of the Restrictive Trade Practices Act. It could be argued that the avoidance of higher costs brings " specific and substantial benefits or advantages " to the " public as purchasers, consumers or users of any goods," to use the language of paragraph (*b*) of section 21 (1), the justification most likely to be relied on in defence of boundary agreements. But, on the other hand, it does not follow that the postulated substantial increase in costs of the societies could be passed on to their *customers* in the form of equally substantial increases in prices (or reductions in patronage dividends), or reductions in quality of service. This is so because the customers could easily escape this burden by transferring their custom to private retailers. The supposed advantages of the restraint on co-operative competition would be substantial for co-operators as consumers only if most co-operators in the area were prepared to remain loyal co-operative customers despite substantial increases in the prices they paid or substantial reductions in the services they received. It is doubtful whether such loyalty is common.

One (or both) of the societies might in due course suffer some loss of capital in the course of inter-society competition released by the removal of a boundary agreement. It is suggested that the avoidance of such possible losses by means of boundary agreements would not constitute any " specific and substantial benefits or advantages " to the public " as purchasers, consumers or users of any goods." These losses would be borne by members of co-operative societies as *investors* in co-operative enterprises and not as *consumers* of goods supplied by co-operative enterprises. It might, of course, be argued that members invest money in co-operative enterprises to further their interests as consumers, and hence that the distinction between the investor and consumer aspects of participation in co-operative societies is untenable. This argument would perhaps be plausible if the individual member's share in the capital of the society was equal to his share in total purchases made by its members. But this equality of interests is not a necessary feature of consumer co-operation.

B. S. Yamey.

Judicial Review of Planning Decisions

In recent cases involving judicial review of powers exercised by administrative authorities, two trends have been clearly discernible. In the first place, the use and scope of the action for a declaration as a means of challenging administrative acts and decisions have been increasing. Secondly, the superior courts have been leaning

heavily against methods of statutory interpretation that would lead to acquiescence in the exclusion of their own jurisdiction to pronounce on questions of law. The decision of the House of Lords in *Pyx Granite Co.* v. *Ministry of Housing and Local Government* [1] confirms these two trends. Of late there have also been faint and ambiguous indications that the courts may possibly be overcoming their deep-rooted aversion from giving countenance to the idea that they may sometimes be ready to scrutinise the merits of the exercise of discretionary powers in which a "policy" element is present. However, the decision of the Court of Appeal in *Fawcett Properties, Ltd.* v. *Buckingham County Council* [2] suggests that no material movement of judicial attitudes in that direction has yet occurred.

The judgment of the Court of Appeal in the *Pyx* case [3] was the subject of a note in (1958) 21 M.L.R. 404, but the facts may be briefly restated. Acting under the provisions of the Town and Country Planning Act, 1947, the Minister made determinations that quarrying operations carried on by the company constituted development for which planning permission was required, and he proceeded to grant permission for certain operations only and to attach various conditions to the permission granted. The company claimed declarations that unconditional planning permission had already been granted to them (by virtue of the combined effect of a Private Act, an agreement made subsequent to that Act, and the 1947 Act and the General Development Orders made thereunder), that the Minister's determinations were therefore of no effect, and alternatively that certain conditions annexed to the grants of permission were invalid. The House of Lords held (reversing the majority of the Court of Appeal on this point) that on the proper interpretation of the Private Act and the subsequent agreement planning permission had already been granted, that the Minister's determinations to the contrary were invalid, that (affirming the view taken by the majority of the Court of Appeal) the courts had jurisdiction to make a declaration to that effect and that that jurisdiction should be exercised in favour of the appellants in the present case.

The most striking aspect of the case is the unanimous view of their Lordships that the machinery prescribed by the 1947 Act for the determination of the relevant questions was not to be treated as exclusive, even though the Minister's decisions were there expressed to be "final." This conclusion was arrived at by a particular application of the common-law presumption against ouster of the jurisdiction of the superior courts. "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words." [4] Recourse to the statutory

[1] [1959] 3 W.L.R. 346; also reported [1959] 3 All E.R. 1.
[2] [1959] 2 W.L.R. 884; also reported [1959] 2 All E.R. 321.
[3] [1958] 1 Q.B. 554.
[4] [1959] 3 W.L.R. at 357, *per* Viscount Simonds.

machinery had not expressly been made obligatory. And the right that the appellants were seeking to vindicate was the common-law right to do what they would with their own land—a right that had been encroached upon by planning legislation. The present case was distinguishable from *Barraclough* v. *Brown*,[5] where the House of Lords had held its declaratory jurisdiction to have been excluded by the prescribed statutory machinery, for in that case the right asserted by the appellant had itself been created by the statute that provided the means of enforcing it.[6]

It would be imprudent to assume that the *Pyx* case foreshadows a state of affairs in which the superior courts will be ready to entertain an unlimited range of declaratory actions brought by persons whose common-law rights are in issue and who prefer not to avail themselves of the prescribed alternative machinery. In the *Pyx* case the substantial question of law involved was a difficult one (although it was hardly of general importance); moreover, some of their Lordships may well have been influenced by the fact that at the time when the case was decided the only alternative method of testing the Minister's ruling in the courts was circuitous and cumbersome.[7] One would be very surprised if the courts were to give any encouragement to property-owners whose premises have been made the subject of demolition or closing orders, or to taxpayers who consider that their tax assessments have been based on wrong legal principles, to ask for declarations as to their rights[8]; the rights affected are indeed common-law rights, but the prescribed methods of determining these questions are recognised as being satisfactory.

Nonetheless, the *Pyx* decision emphasises the fact that the scope of the declaration as a judicial remedy in administrative law is being cautiously extended. Those who look for pointers to the future may take their guidance either from the circumspection of Viscount Simonds (" where the administrative or the quasi-judicial powers of the Minister are concerned, declaratory judgments should not readily be given by the court ")[9] or from the downrightness of Lord Goddard (" I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case ").[10]

[5] [1897] A.C. 615.

[6] For the fullest analysis of the material distinctions between the two cases, see the speech of Lord Jenkins ([1959] 3 W.L.R. at 369–371), praying in aid the third rule laid down by Willes J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859) 6 C.B.(N.S.) 336, at 356.

[7] *Cf.* the observations on this point by Lord Denning in the Court of Appeal [1958] 1 Q.B. at 566–567. See now Town and Country Planning Act, 1959, s. 32, giving a right of appeal to the High Court from determinations made by the Minister under s. 17 of the 1947 Act.

[8] *Cf. Cohen* v. *West Ham Corporation* [1933] Ch. 814; *Smeeton* v. *Att.-Gen.* [1920] 1 Ch. 85.

[9] [1959] 3 W.L.R. at 358.

[10] *Ibid.*, at 360. His Lordship added: " The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari."

Since the Minister's determinations were held to be ineffective, it was unnecessary for their Lordships to consider either the validity of the conditions that he had purported to impose or the propriety of challenging them by an action for a declaration, and no opinion was expressed on these matters. In future the validity of such conditions, if contained in the decision of the Minister, will be reviewable only by the special procedure provided by section 31 of the Town and Country Planning Act, 1959, but it does not appear that this procedural change will affect the scope of review, which is still somewhat indeterminate. Of the several important questions that await an answer, the most pressing concerns the circumstances in which an invalid condition may be severed from the grant of permission to which it is annexed. There is little doubt, however, that the courts do have jurisdiction to declare a condition to be invalid. Such a power was assumed to exist (in another context) in the *Wednesbury Corporation* case [11] and by the majority of the Court of Appeal in the *Pyx* case, and was exercised by Roxburgh J. in *Fawcett's* case.[12] The Court of Appeal, although reversing the judgment of Roxburgh J., cast no doubt upon the existence of the power.

The judgments in the Court of Appeal in *Fawcett's* case conclusively rebut the assertion (which still appears in a number of books) that English law recognises a general principle to the effect that administrative powers must be exercised reasonably. The local planning authority had granted the plaintiff's predecessor in title permission to build a pair of semi-detached farmworkers' cottages, subject to the condition that the occupation of the cottages should be limited to persons whose employment or latest employment was or had been in agriculture, forestry or an industry mainly dependent on agriculture, and the dependants of such persons. The reason given for imposing the condition was that the authority was not prepared to permit the erection of dwelling-houses on the site unconnected with the use of the adjoining land for agriculture. The plaintiff, who wished to put into occupation persons not falling within the terms of the condition, claimed declarations that (*inter alia*) the condition was *ultra vires* or void for uncertainty. He relied particularly upon Lord Denning's dictum in the *Pyx* case that such conditions "must fairly and reasonably relate to the permitted development." [13] The condition, as it stood, could not properly effectuate the purposes it was designed to serve; the outline development plan for the area aimed at preserving its predominantly rural character, but the impugned condition could be complied with by putting into occupation persons who had no connection whatsoever with local agriculture; to that extent the reasons given for imposing

[11] *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.
[12] [1958] 1 W.L.R. 1161; [1958] 3 All E.R. 521.
[13] [1958] 1 Q.B. at 572.

the condition were inconsistent with its terms. In short, the local authority must be deemed to have taken irrelevant matters into account in exercising its discretion. Moreover, the condition was vaguely worded; and inasmuch as non-compliance might lead to penal consequences, it should be held to be void for uncertainty in accordance with the tests applied to determine the validity of by-laws.

These contentions, although sympathetically received, were of no avail. The condition was ill-drafted; it was not the most efficient means of achieving its object; but, read as a whole, it was in broad conformity with local planning policy and bore an intelligible relationship to that policy; the written reasons that the authority had given for imposing it were not entirely satisfactory, but the court could not infer that the authority must therefore have had regard to irrelevant considerations. If the plaintiff had been able to demonstrate that the condition was not merely unreasonable but absurd, the court, applying the principles laid down by Lord Greene M.R., in the *Wednesbury* case,[14] might have been ready to conclude that the authority had gone outside its powers by taking irrelevant factors into account, but this was not the case. And although Lord Evershed M.R. and Romer L.J. were prepared to assume that a condition might be declared void for uncertainty, independently of any other head of invalidity,[15] the plaintiff had not succeeded in establishing the requisite degree of uncertainty.

Neither the several formulations of the appropriate legal tests of invalidity nor the application of those tests to the particular facts can be adequately discussed in this brief comment on a difficult but extremely interesting case. To one seeking to place the decision in the larger context of the law relating to judicial review of administrative action, perhaps the most significant passage in the judgments is to be found in Romer L.J.'s statement of general principle[16]:

> "Now, conditions attached to development permission do not strictly constitute planning policy; they are rather means of effectuating a policy already predetermined. I think nevertheless that they are entitled, equally with the policy which they are designed to implement, to the shelter of what I might call the *Wednesbury* umbrella. The reasons for giving that shelter to decisions on policy are, in my opinion, equally applicable to the machinery which is essential for rendering those decisions effectual."

In such a climate of judicial opinion, the burden of proving either that the considerations to which the deciding authority had regard

[14] [1948] 1 K.B. 223.

[15] Pearce L.J., on the other hand, took the view that uncertainty was "not a separate point but merely one of the points whose cumulative effect may prove that the council cannot have taken the right things into account" ([1959] 2 W.L.R. at 904).

[16] *Ibid.*, at 898.

were legally irrelevant or that the decision was one which no reasonable authority could have arrived at is unlikely to be discharged except where powers have been flagrantly misused.

S. A. de Smith.

Natural Justice and the Barnsley Co-op.

The granting of a spirits off-licence to a co-operative society in Barnsley is hardly a situation out of which a leading case would seem likely to emerge. Nevertheless, the decision of the Divisional Court of the Queen's Bench Division in *R.* v. *Barnsley Licensing JJ., ex p. Barnsley and District Licensed Victuallers' Association*,[1] is of unusual interest. It provides a useful case-study in statutory interpretation; it illustrates some of the difficulties experienced in applying the maxim *nemo judex in causa sua*; and it is remarkable for the fact that a fundamental rule of direct relevance to the decision was not referred to in either of the judgments.

The society's application for an off-licence was granted by seven justices, six of whom were members of the society. The chairman of the meeting of licensing justices had been an unsuccessful candidate for election to a directorship of the society in the previous year. Associations representing licensed victuallers and off-licence holders in Barnsley applied for certiorari to quash the decision on the grounds that one or more of the justices were disqualified by section 48 of the Licensing Act, 1953, and were thereby biased. Section 48 sets out a number of disqualifications of licensing justices for various forms of pecuniary or proprietary interest. Section 48 (4) disqualifies a justice from acting for any purpose under the Act in a case concerning premises in the profits of which he has a beneficial interest; section 48 (5) provides that no act done by any justice disqualified under that section shall be invalid by reason only of that disqualification; section 48 (6) renders a justice liable to a penalty if he acts knowing that he is disqualified by the Act. In some respects the disqualifications set out in section 48 go beyond the common-law disqualification for direct pecuniary interest, but subsection (4) substantially restates the common-law rule. It would seem to follow, therefore, that subsection (5) protects from challenge decisions made by justices disqualified for pecuniary interest either at common law or by any provision of section 48. This construction of the subsection commended itself to Lord Parker C.J. and Donovan J. In a forcefully argued dissenting judgment, Salmon J., beginning with the proposition that the common-law rule could be displaced only by unambiguous language, held that section 48 left the common-law disqualification untouched so that it ran parallel with the statutory disqualification under subsection (4), and that since subsection (5) was expressed to save only acts done by persons disqualified

[1] [1959] 3 W.L.R. 96; also reported [1959] 2 All E.R. 635.

under that section it offered no protection to acts done by persons disqualified at common law. With respect, however, this construction of subsections (4) and (5) appears excessively strained.

None of the members of the court was prepared to construe subsection (5) as validating every breach of the common-law rule *nemo judex in causa sua*. The common-law rule is directed not only against adjudication by any person who has any pecuniary interest in the case before him; it is also directed against adjudication by one whose position in relation to the parties or the issues gives rise to a likelihood of bias. Even if the vitiating effect of a trivial pecuniary interest had been removed by subsection (5), the subsection could still be restrictively construed so as to leave open the possibility of challenge for likelihood of bias, although challenges based on this ground had almost invariably been founded on allegations other than pecuniary interest. Lord Parker C.J. (delivering the judgment of himself and Donovan J.) accordingly considered whether the interest of the justices as shareholders of the society and as potential customers of the shop (from which, as members, they would obtain a small annual rebate in respect of their own purchases) gave rise to a real likelihood of bias on their part. On the facts he held that it did not. Since Salmon J. was of the opinion that certiorari should issue because of the common-law disqualification, it was not strictly necessary for him to consider this question; but he did consider it and, after referring to the element of financial benefit (" the advantage of being able to buy a bottle of gin at about half-a-crown . . . below the retail list prices . . . may be . . . small, but to any ordinary mortal the advantage is a real one "), to the somewhat embarrassing position of the chairman and to the *esprit de corps* that might be expected of members of a co-operative society, arrived at the opposite conclusion to the majority of the court. It is worth noting that his Lordship, in order to ascertain whether there was a real likelihood of bias, applied the test of a reasonable man fully conversant with the facts of the case. But a finding that there is a real likelihood that members of a tribunal have been affected by bias is a serious one, and one inclines to the view that where allegations of this nature are made it is desirable for the judge to substitute himself for the hypothetical reasonable man.

If Salmon J.'s approach had been adopted by another member of the court and the decision had been quashed, for pecuniary interest *per se* or for likelihood of bias or on both grounds, it would have been impossible for any similar application by the co-operative society to be heard in Barnsley, inasmuch as all but one of the justices were members of the society so that a quorum could not have been formed. On Salmon J.'s view of the matter, it might have also been impossible for a Barnsley bench to be constituted in connection with summary criminal proceedings relating to the society. His Lordship was not unmindful of these difficulties (which were not mentioned in the majority judgment), but he regarded

them as " of little importance in comparison with the principle involved." [2] With all respect, these difficulties appear to be of paramount importance; and they can be disposed of by applying the well-known common-law doctrine of necessity, which provides that an adjudicator who is subject to disqualification at common law for interest or likelihood of bias is required to act if there is no other competent tribunal or if a quorum cannot be formed without him.[3] It is indeed surprising that this doctrine, which gave a conclusive answer to the contentions of the applicants for certiorari in the present case, was ignored in both the majority and the minority judgments.

Finally, all members of the court agreed that the right of the applicants to move for certiorari was not taken away by their solicitor's omission to object to the qualifications of the justices at the hearing of the original licensing application. He had neither known nor had ready means of knowing of their connection with the society, and it was not part of an advocate's duty to put " fishing questions " to members of a tribunal in the hope of eliciting such information.

S. A. de Smith.

Supervision of Expert Tribunals by the Courts

The Tribunals and Inquiries Act, 1958, has given certiorari a wider application than before; the recent decision of the House of Lords in *Baldwin & Francis, Ltd.* v. *The Patents Appeal Tribunal and others* [1] is therefore of some general importance.

The facts were shortly these. The appellants, the applicants for an order of certiorari, were the proprietors of Letters Patent No. 658823 relating to an electric lockout relay. The third and fourth respondents (hereinafter called the respondents) had applied for a patent relating to a similar device which bore the number 703630. The appellants opposed the grant of a patent to the respondents, *inter alia*, on the ground that the respondents' invention could not be performed without substantial risk of infringement of claim 1 of the appellants' patent No. 658823. If the Patent Office finds that there is a substantial risk of infringement of an older patent, it does not refuse to grant a patent, but it orders that a reference be inserted into the specification as provided by section 9 (1) of the Patents Act, 1949. The effect of such a reference was stated by Lord Denning to be " . . . very limited. It is interlocutory in nature. Even when

[2] [1959] 3 W.L.R. at 107.

[3] See *Judicial Review of Administrative Action*, 164.

[1] That decision is reported in [1959] 2 All E.R. 433: the decision of the Court of Appeal in [1959] 1 Q.B. 105; [1958] 2 All E.R. 368 (noted 21 M.L.R. 563); and the proceedings in the Divisional Court [1957] R.P.C. 465. The decision of the Patents Appeal Tribunal has been cited verbatim by Lord Morton. The other members of the House were Lord Reid, Lord Tucker, Lord Somervell and Lord Denning.

made, it does not give the appellants any greater rights than they had before, it is more a detriment to the respondents than a benefit to the appellants." [2]

Claim 1 of the appellants' patent contained four alternatives which were called in the proceedings A, B, C and D. It was common ground that there was only a risk of infringement of the fourth alternative D and that the other three alternatives were immaterial. There was no further dispute that the example given in the respondents' patent specification and shown by a drawing fell within the alternative D of the appellants' claim 1 as construed by them. The superintending examiner acting for the Comptroller-General of Patents heard contradictory evidence of a scientific nature as to the meaning of certain technical terms used in the appellants' specification and came to the conclusion that the example given by the respondents which admittedly amounted to an infringement of alternative D on the appellants' construction of their claim would constitute a substantial risk of infringement, and ordered that the statutory reference be inserted into the respondents' specification.

The respondents appealed against that decision to the Patents Appeal Tribunal (hereinafter referred to as P.A.T.). The argument of the respondents before P.A.T. was twofold: (i) that their invention could be carried out otherwise than shown in their drawing and (ii) that they disputed the appellants' construction of claim 1 of patent specification No. 658823. The appellants' reply was that the reader of the instruction given by the respondents' specification would in the first instance carry out the instruction as shown in the drawing and so infringing alternative D. The P.A.T., however, accepted the respondents' submission and allowed the appeal. In the written decision it was remarked that the question whose submission was correct was " a simple matter of technical significance susceptible of ready proof by evidence," and held that there was no evidence before him which would justify him " in holding that the respondents' contention (as to the possibility that their invention could be worked in a way which would not infringe claim 1 of the appellants' patent) was not well founded "; and the P.A.T. reversed the decision of the superintending examiner.

The appellants now moved for an order of certiorari. The application came before Lord Goddard C.J. and Donovan J. It should be mentioned that Lord Goddard C.J. offered to convene a special court with a judge expert in patent matters, but the late Mr. James Mould, Q.C., who appeared for the appellants, declined that offer.

The first point taken by Mr. Mould for the appellants was, that the absence of evidence did not entitle the P.A.T. to depart from the findings of the superintending examiner who was a technical expert and could decide a technical matter on his own expert

[2] [1959] 2 All E.R. at p. 449.

knowledge. That point was not dealt with by the Divisional Court. It seems to be a substantial ground for complaint which might easily arise whenever there is an appeal from an expert to a less expert tribunal. The attitude adopted by the P.A.T. is at variance with the former practice of the P.A.T. which adopted the practice laid down by the Law Officers to whom before 1932 an appeal from the Comptroller-General in patent matters lay, and who interfered with a decision of the Comptroller only if it was clearly established that the decision was wrong.[3] It is submitted that in the absence of sufficient evidence the P.A.T. should either remit the case or call for the assistance of a scientific adviser as provided in the Patents Appeal Rules, 1950, rule 11 *et seq.*, rules similar to Order 37A of the Rules of the Supreme Court.

The second ground for the application for certiorari before the Divisional Court was that the P.A.T. misconstrued section 9 (1) of the Patents Act, 1949. The Divisional Court treated that point as a pure question of fact. After the hearing before the Divisional Court Mr. Mould died and Mr. Patrick Graham, Q.C., who appeared in the higher courts as counsel for the appellants, took there only the third point, which was as follows.

The P.A.T. in its written decision mistakenly dealt only with alternative B of claim 1 which was immaterial and omitted to refer to alternative D. The effect of that mistake was that the written decision made no sense. An admission that the reference to alternative B was an error was made in the House of Lords by counsel for the respondents. Lord Denning recited those admissions in his opinion as follows[4]:

> "The judge has taken the wrong alternative. He has taken alternative (B) whereas he should have taken alternative (D). Our contentions were never based on alternative (B) but on alternative (D). The only explanation we can suggest is, that, at the end of the argument, the judge was in our favour, but that owing to the time which elapsed before he came to write his judgment he took the wrong alternative."

In order to appreciate that error the respective patent specifications had to be looked at and construed. Mr. Mould had prepared for use in the Divisional Court a series of drawings which showed the working of the respondents' system as described in their specification. He offered to explain the respondents' patent specification with the assistance of those drawings. The Divisional Court refused to be instructed by counsel[5] though, as already mentioned, it was prepared to convene a special court.

The Court of Appeal, on the other hand, did listen to the instruction on the electrical technicalities given by Mr. Graham, and with

[3] *Per* Herschell S.-G., in *Re Glossop's Patent* (Griffith, *Patent Cases*, at p. 286). Sir Thomas Inskip S.-G.'s decision in *Re Zucker's Application* (44 R.P.C. 257) was to the same effect.

[4] [1959] 2 All E.R. at p. 447.

[5] [1957] R.P.C. at p. 466, *per* Lord Goddard C.J., at p. 469, *per* Donovan J.

the help of the visual aids and an analysis of claim 1 of the appellants' specification understood the technical facts necessary to construe the patent specifications. The same can be said of the Law Lords. The Court of Appeal, however, dismissed the appeal on the ground that they could not construe the patent specifications without being informed *by evidence* as to the meaning of the technical terms used and that being so the application for certiorari failed *in limine* because the court in these proceedings was not entitled to look at the evidence given in the proceedings or to receive new evidence on affidavit.

The House of Lords, for its part, did not accept the view expressed by the Divisional Court that they could not deal with technical matters on certiorari, a view which would have stultified the effect of section 12 of the Tribunals and Inquiries Act, 1958. Lord Morton agreed with the view expressed by Parker L.J. (as he then was) so far as reception of evidence was concerned, but he stated that there were:

> " . . . other means whereby the meaning of technical words may be ascertained. For instance, counsel are sometimes ready to agree that well-known technical words have a particular meaning. In the present case the House was greatly assisted by an analysis of claim 1 of the appellants' specification . . . and accepted as correct by counsel for the respondents. Moreover, the court has power to appoint assessors under section 98 of the Supreme Court of Judicature (Consolidation) Act, 1925. It would indeed be regrettable in present times, when certiorari lies to so many tribunals dealing with scientific matters, if the courts were precluded from considering whether there was an error of law on the face of the record because they did not know the meaning of certain technical terms." [6]

There is further the possibility of appointing a court expert under Order 37, rule 1, and of a special referee to inquire and report under the new Order 36, rule 2, made in consequence of a recommendation of the Evershed Committee in its report.[7]

Of special interest is the speech of Lord Reid, who pointed out that, in most cases, the courts could deal with technical questions on the instructions given to them by counsel because usually there could hardly be a dispute about *basic* technical facts. The importance of this decision seems to be that in future the Divisional Court of the Queen's Bench Division cannot refuse to be instructed in technical matters either by counsel or by independent scientific advisers.

Notwithstanding the different approach by the Law Lords the appeal was dismissed. All Law Lords except Lord Denning were of the opinion that no error was shown on the face of the record. Lord Denning held that there was an error shown, but he would not

[6] [1959] 2 All E.R. at pp. 438, 439.
[7] 1953, Cmd. 8878, paras. 292–295.

exercise his discretion in favour of the appellants, because there were other remedies available to them. The appellants could when they saw that the tribunal had overlooked alternative D have gone back and pointed out the error; the tribunal might have then dealt with the right alternative and might indeed have made a different order if it thought fit to do so. No more could be achieved by certiorari or mandamus. His Lordship did not know why the appellants did not do this except perhaps they did not think of it. This suggestion of going back to a tribunal seems to be of considerable importance and might usefully be adopted where both parties agree that the decision contained an error.

Why did four of their Lordships find no error on the face of the record in the circumstances? Lord Tucker was of the opinion that the order spoke " with the ambiguous voice of the oracle " and reserved his decision whether that was equivalent to the sphinx showing its " inscrutable face." Lord Morton held that the omission of a good reason and the giving of a bad one did not constitute an error on the face of the record because the judge was not bound to give any reason. That ground would not be available wherever a tribunal has to give reasons, *e.g.*, where it is bound to do by section 12 of the Act of 1958.

Lord Reid was of the same opinion as Lord Morton. Only Lord Denning held that the sphinx has to give a reasoned decision.

Another important point which was left open was the question of what constitutes the record where the decision of an appeal tribunal is brought up for review. Lord Denning was of the opinion that everything which touches the matter has to be brought up including the decision of the tribunal of first instance. Lord Tucker expressly reserved that question for future consideration and threw doubt on certain *obiter dicta* of the Court of Appeal in the *Northumberland* case,[8] thereby throwing uncertainty on that leading case.

F. G. Guttman.

Premium-Taking at a Discount

The provisions of the Landlord and Tenant (Rent Control) Act, 1949, prohibiting the taking of premiums in respect of rent-controlled property are notoriously badly drafted. They leave many questions open. Landlords have been tempted at times to seek in these ambiguities loopholes which might enable them to extract legally from tenants payments or other benefits analogous to premiums. The tide, however, seems to be running strongly against them.

Among the questions raised by the Act are these. Must a premium be a cash payment? Must it be paid to the landlord? If it is paid to a third party, from whom, if at all, is it recoverable?

[8] *R.* v. *Northumberland Compensation Appeal Tribunal* [1952] 1 K.B. 338.

What if it is paid not by the tenant but by a third person? Many of these questions have now been answered in *White* v. *Elmdene Estates, Ltd.*[1] W and his wife owned a house but were forced by financial circumstances to sell it and rent a flat. The defendants let one of their flats to W alone but required as a condition of their so doing that W and his wife should sell their house to a company closely associated with the defendants for £1,800 although it was agreed that the true value was £2,300. W alone sued to recover the difference, £500, as a premium. No objection was taken in the county court to the non-joinder of W's wife. Was W entitled to recover £500, £250 or nothing at all?

The definition of "premium" in section 18 (2) gives little help on these points. "Premium" includes any fine or other like sum and "any other pecuniary consideration in addition to rent." Section 3 expressly provides for the cases where the tenant is required to buy furniture, fittings or other articles at an overvalue and this provision has recently been strengthened by the Landlord and Tenant Act.[2] But nothing is said as to tenants required to sell something at an undervalue.

It was contended for the defendants that, as there was no cash payment and as in any event the defendants received nothing, no illegal premium was involved in the transaction. The Court of Appeal, however, held that, as the reduction in the price of the house had been quantified by the parties at £500, it was a "pecuniary consideration in addition to rent." They further held that notwithstanding dicta in *R.* v. *Birmingham* (*West*) *Rent Tribunal*,[3] the giving of such consideration to a third party at the request of the landlord was equivalent to payment to the landlord.

As is usual in Rent Act cases of this type, much argument was based on the history of the legislation since 1915 and on small variations in the language used from time to time as well as the exact wording of the present provisions. The court found no difficulty in holding that "payment" of a premium might connote ways of discharging obligations other than the transfer of cash. Nor was the use of the word "repaid" in the Act sufficient to prevent the landlords from being liable to recoup to the tenant a sum which had never in fact been paid to them. Consideration, though it must move from the promisee, need not move to the promisor and payment to a third party at the landlord's direction was simply payment to the landlords in a manner indicated by them.

It followed that the premium was recoverable from the landlords. The Act is mainly directed at the person "requiring" the premium. It is he who can be prosecuted and who in the criminal proceedings can be ordered to repay the premium.

[1] [1959] 3 W.L.R. 185; also reported [1959] 2 All E.R. 605.
[2] Landlord and Tenant (Furniture and Fittings) Act, 1959.
[3] [1951] 2 K.B. 54.

Finally it was held that the premium was paid jointly by W and his wife and not half by each. As no objection had been taken to non-joinder of the wife, W was entitled to recover the whole £500.

Thus the gaps or supposed gaps left by the Act are gradually being closed. Devices based on section 12 (7) of the 1920 Act (which excludes from control lettings at less than two-thirds of the rateable value) and those which rely on a fine distinction between premiums and "commuted rent" or rent in advance are much less safe since *Woods* v. *Wise*[4]; *Samrose Properties, Ltd.* v. *Gibbard*[5] and *Grace Rymer Investments, Ltd.* v. *Waite*.[6]

Now the device of payment to a third party seems doomed. Nor does payment in kind hold out much hope, although it can still be argued that the decision in *White* v. *Elmdene Estates, Ltd.* turned on the fact that the amount of the premium had been quantified by the parties. There are difficulties in applying some of the provisions of the Act to a benefit upon which no value has been put by the parties. But it is doubtful whether many landlords would care to take the risk of demanding such a benefit in the face of the present trend of the cases.

J. Montgomerie.

Reliance by Stevedores on Clauses in Bills of Lading

When referring to the Carriage of Goods by Sea Act, 1924, Lord Macmillan observed in *Stag Line, Ltd.* v. *Foscolo, Mango & Co., Ltd.*[1]:

> "It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign courts it is desirable in the interests of uniformity . . . that the language of the rules should be construed on broad principles of general acceptation."

This plea for uniformity, though not specifically mentioned in the judgments, has recently been exemplified by the decision of the High Court of Australia in *Wilson* v. *Darling Island Stevedoring and Lighterage Co., Ltd.*,[2] that of the United States Supreme Court in *Krawill Machinery Corporation* v. *Robert C. Herd & Co. Inc.*,[3] and that of the Commercial Court in *Midland Silicones, Ltd.* v. *Scruttons, Ltd.*[4] In all these cases stevedores who had caused damage to cargo in their custody sought to limit or exclude their

4 [1955] 2 Q.B. 29.
5 [1958] 1 W.L.R. 235.
6 [1958] Ch. 831.
1 [1932] A.C. 328, at 350.
2 [1956] 1 Lloyd's Rep. 346.
3 [1959] 1 Lloyd's Rep. 305.
4 [1959] 1 Lloyd's Rep. 289.

liability by relying on clauses in the respective bills of lading to which they were not parties.

In *Wilson* v. *Darling Island Stevedoring and Lighterage Co., Ltd.*,[5] the bill of lading related to a shipment of a case of *tulle soie* and *tulle rayonne* from Marseilles to Sydney and it incorporated the terms of the English Carriage of Goods by Sea Act, 1924, in which the word " carrier " is defined in the following terms: " ' Carrier ' includes the owner or the charterer who enters into a contract of carriage with a shipper." [6] The bill contained a clause stating that:

> " goods in the custody of a carrier or his agents or servants before loading and after discharge, whether being forwarded to or from the vessel or whether awaiting shipment, landed, or stored, or put into hulk or craft belonging to the carrier or not, or pending transhipment at any stage of the whole transport, are in such custody at the sole risk of the owners of the goods and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever."

While the goods were being stacked after discharge, a mobile crane operated by the stevedores struck an overhead water sprinkler system. The main pipe of it was fractured and water from it damaged the goods, which became mildewed and worthless. The High Court of Australia held by a majority of three judges to two that the stevedores were not entitled to rely on the terms of the bill of lading and were liable in full. In giving judgment Kitto J. did not mention the word " carrier " used in the Act, but with reference to the clause in the bill of lading said [7]:

> " The exemption provision . . . certainly begins by stating that goods in the custody of the carrier or his agents or servants after discharge are in such custody at the sole risk of the owners of the goods, but this I read as intended to exclude the carrier only from the risk; for the sentence proceeds without a break, to state as the consequences that the carrier—no mention being made of his servants—shall not be liable for loss or damage."

Fullagar J. said that in the view which he took:

> " nothing turns on the construction of the particular bill of lading in this case, and on that matter I will say only two things. . . . The second is that . . . I should have held that, as a matter of construction, the shipowner only was protected by the material clause in the bill of lading." [8]

A different view, however, was taken by Taylor J. in a dissenting judgment where he observed [9]:

> " The provisions of this clause clearly appear as a stipulation intended exclusively to regulate the rights of the consignee

[5] *Supra.*
[6] Sched., Art. I (*a*)
[7] [1956] 1 Lloyd's Rep. at 368.
[8] *Ibid.*, at 364.
[9] *Ibid.*, at p. 374.

whether the contract is carried out entirely by the shipowner—which is a matter of practical impossibility—or partly by his servants and partly by his agents."

Williams J., who also dissented, said [10]:

> "It was, however, contended that since the second sentence of this clause, after referring to the goods in the custody of the carrier or his agents, ends by providing that the carrier, not the carrier and his agents, shall not be liable for loss or damage arising or resulting from any cause whatsoever, the language of the sentence is apt only to confer an immunity on the carrier and not to extend it to his agents. But it is an express term of the bailment that goods in the custody of the carrier or his agents are in such custody at the sole risk of the owners of the goods, and the immunity of the carrier must extend to his agents if this term of the bailment is to have an effective operation."

In *Krawill Machinery Corporation* v. *Robert C. Herd & Co. Inc.*[11] a bill of lading was issued in respect of a crated press to be shipped at Baltimore for Valencia which fell into Baltimore Harbour while being lifted by a floating crane from a railroad-car into the hold of the vessel. The terms of the United States Carriage of Goods by Sea Act, 1936, were incorporated into the provisions of the bill of lading which contained a clause stating:

> "In consideration of a choice of freight rates having been offered to the shipper by the carrier, it is agreed that in case of loss of, or damage to . . . goods of an actual value exceeding $500 . . . per package . . . the value of such goods shall be deemed to be $500 per package . . . and the carrier's liability shall be determined on the basis of $500 per package."

The Act itself defines the word "carrier" [12] in similar terms to those to be found in the English Carriage of Goods by Sea Act, 1924, *viz.*, as including "the owner or the charterer who enters into a contract of carriage with a shipowner." The United States Supreme Court held that the stevedores, who were operating the crane, could not rely on the terms of the bill of lading and so could not limit their liability under section 4 (5) of the Act, and were liable for the full amount of the damage that had resulted.

In giving the judgment of the court, Mr. Justice Whittaker said that the Hague Rules on which the Act was founded did not advert to stevedores or agents of a carrier, and observed [13]:

> "The debates and Committee Reports in the Senate and the House upon the bill that became the Carriage of Goods by Sea Act, 1936, likewise do not mention stevedores or agents. There is thus nothing in the language, the legislative history or environment of the Act that expressly or impliedly indicates any

[10] *Ibid.*, at p. 356.
[11] *Supra.*
[12] s. 1 (4).
[13] [1959] 1 Lloyd's Rep. at p. 308.

> intention of Congress to regulate stevedores or other agents of a carrier, or to limit their liability for damages caused by their negligence. It must be assumed that Congress knew that generally agents are liable for all damages caused by their negligence. Yet Congress, while limiting the amount of liability of 'the carrier [and] the ship,' did not even refer to stevedores or agents."

The court also considered the terms of the bill of lading and said that they did not advert to stevedores or agents. There was nothing in them to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties, it must be presumed that they would in some way have expressed it in the contract.

In *Midland Silicones, Ltd.* v. *Scruttons, Ltd.*[14] a drum of chemicals was negligently dropped by stevedores while loading it onto a lorry after it had been discharged from a ship. The bill of lading in respect of it incorporated the terms of the United States Carriage of Goods by Sea Act, 1936, which defines the term " carrier " in the way set out above. It also contained a clause stating:

> " In this bill of lading . . . the word 'carrier' shall . . . include the ship . . . her owner, operator and demise charterer, and also any time charterer or person to the extent bound by this bill of lading whether acting as carrier or bailee."

Diplock J. held that the stevedores could not limit their liability and were liable in full in respect of the damage to the drum. In giving judgment he observed [15]:

> " It does not, therefore, seem to me that the words either of the Act or of the bill of lading relating to the meaning of the word 'carrier' so extend its meaning as to include stevedores engaged by the carrier, and I hold that the bill of lading, upon its true construction, does not purport by any express words to 'govern the relations, whatsoever they may be, between shipper, consignee' and any stevedores engaged by the carrier. Insofar as my so holding depends upon the true construction of the U.S. Carriage of Goods by Sea Act, 1936, I have the powerful support of the United States Supreme Court." [16]

In the three cases mentioned a variety of arguments was presented to the High Court of Australia, the United States Supreme Court and the Commercial Court, to persuade them that the stevedores should be entitled to rely on the terms of the bills of lading, even though they were not mentioned in them, and irrespective of the meaning of the word " carrier " contained in the statutory provisions.

[14] *Supra.*
[15] [1959] 1 Lloyd's Rep. at p. 298.
[16] *Viz., Krawill Machinery Corporation* v. *Robert C. Herd & Co.* (*supra*).

These included pleas (1) that the stevedores were the undisclosed principals of the shipowners; (2) that the House of Lords decision in *Elder Dempster & Co., Ltd.* v. *Paterson Zochonis & Co.*[17] was an authority for the principle of vicarious immunity from liability for torts; (3) that there was an implied contract between the stevedores and the shippers of the goods relieving the former from liability; (4) that statements in recent cases asserted the existence of a general principle upon which a *jus quaesitum tertio* arising out of contract was recognised in English law[18]; and (5) that the stevedores were sub-bailees of the goods and as such were entitled to the benefit of the limiting provision of the contract.

But all these contentions failed. The attitude of the High Court of Australia can be found to be succinctly stated in the judgment of Fullagar J. where he observed[19]:

> "The stevedore is a complete stranger to the contract of carriage and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. . . . If the stevedore negligently soaks cargo with water and ruins it, I find neither rule of law nor contract to save him from the normal consequences of his tort."

The United States Supreme Court overruled the majority judgment of the United States Court of Appeals, Fifth Circuit, in *A. M. Collins & Co.* v. *Panama R. Co.*[20] where Circuit Judge Rives said[21]:

> "A stevedore so unloading, in every practical sense, does so by virtue of the bill of lading and, though not strictly speaking a party thereto, is, while liable as an agent for its own negligence, at the same time entitled to claim the limitation of liability provided by the bill of lading to the furtherance of the terms of which its operations are directed."

The Supreme Court considered that the case was wrongly decided, for it ran counter to a long-settled line of decisions of the Supreme Court.[22]

> "From its earliest history this court has consistently held that an agent is liable for all damages caused by his negligence unless exonerated therefrom, in whole or in part, by a statute or a valid contract binding on the person damaged."[23]

[17] [1924] A.C. 487. See also *Mersey Shipping & Transport Co., Ltd.* v. *Rea, Ltd.* (1925) 21 Ll.L.Rep. 375, at 378.

[18] *e.g., Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, at 514; *White* v. *John Warwick & Co., Ltd.* [1953] 1 W.L.R. 1285, at 1294; *Adler* v. *Dickson* [1955] 1 Q.B. 158, at 181.

[19] [1956] 1 Lloyd's Rep. at 364.

[20] (1952) 197 F. 2d 893.

[21] At p. 896.

[22] *Osborn* v. *Bank of the United States* (1824) 9 Wheat. 738; *Reid* v. *Fargo* (1916) 241 U.S. 544; *Sloan Shipyards Corporation* v. *Emergency Fleet Corporation* (1921) 258 U.S. 549; *Brady* v. *Roosevelt Steamship Co.* (1943) 317 U.S. 575.

[23] [1959] 1 Lloyd's Rep. 309.

Diplock J. considered that the case before him was governed by the fundamental principles laid down by Lord Haldane in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.*[24] that only a person who was a party to a contract could sue on it,[25] and that in order to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. Accordingly since these conditions did not exist in the present case, the stevedores could not limit their liability.

Perhaps one way in which stevedores could rely on an exemption clause in bills of lading would be if they were redrafted so that the carrier would contract as "agent of the stevedores." But such a process of redrafting would probably be considered impracticable and might lead to confusion, for the stevedores are concerned only with part of the performance of the contract of carriage of goods by sea. Possibly instead the contracts made between shipping companies and stevedores could be so phrased that the latter, though liable directly to the shipper if they were negligent, would be entitled to recoup themselves to a limited extent from the shipping companies, who would pass on to the shippers their contingent liability in the form of increased freight rates.

E. R. HARDY-IVAMY.

ACTION FOR LOSS OF SERVICES

LEGAL problems tend to be no less responsive to cycles of quickening and diminishing interest than other social issues. Thus, in the field of torts, the action for loss of services has in recent years, after long neglect, suddenly emerged as the focal point of renewed and sustained attention. This is largely due to the impact of welfare economics. Just as the master's action was propelled into prominence in the fourteenth century by the scarcity of labour following in the wake of the Black Death, thereby temporarily giving economic significance to his interest in the continued services of his employees, so the modern practice of employers meeting the cost of medical aid and disability pay for incapacitated servants has stimulated recourse to this action as a device for shifting that expense to the accident-responsible defendant. This consideration, more than any other, perhaps, should give pause to those who are heard to condemn this action so readily as an incongruous anachronism under modern conditions. For, surely, a legal rule may earn its claim to survival, long after disappearance of the social order which gave it birth, provided it continues to be responsive to current, if novel, needs.[1]

[24] [1915] A.C. 847 at 853.

[25] Recognised exceptions include a right to take the benefit of a contract conferred by way of property, *e.g.*, under a trust, and a right to enforce covenants running with the land.

[1] *Cf.* Renner, *The Institutions of Private Law* (ed. Kahn-Freund); and my earlier analysis of "The Action *Per Quod Servitium Amisit*," from this point of view, in 26 Aust.L.Jo. 122 (1952).

As the Australian High Court was first to yield to the entreaties of the reformers, by rejecting the claim of the Crown to recover for loss of the services of an airman [2] and, later, a police-officer,[3] it is the more significant that, in a recent case, *Commissioner for Railways (N.S.W.)* v. *Scott*,[4] it has stemmed the tide of further erosion and declined to follow the lead of the English Court of Appeal which had, in the meantime, gone to the length of restricting the action to cases of domestic employment.[5] Authority for that drastic step, skilfully manipulated by Denning L.J., was indeed extremely tenuous, and the High Court, in allowing the claim of the Commissioner for Railways for loss of the services of an engine driver, encountered little difficulty in exposing its weakness. After all, there was no warrant in pleading manuals, textbooks or precedent for attributing so narrow a scope to the action, apart from an isolated dictum by Eyre C.J. in 1795 who thought that it had not gone "further than the case of a menial servant." [6] The cavalier explanation of *Martinez* v. *Gerber* (1841),[7] as a case where the "servant and traveller" could be assumed to have shared his master's lodgings, is in fact belied by the reported argument that he was a "traveller paid only for the journeys which he performed." [8] Besides, if we are to retrace our steps and repudiate the consistent practice of the last 150 years which had not acknowledged any such limitation, why halt at the eighteenth century instead of abolishing the action altogether on the ground that the original *status* relation has disappeared? In sum, it appeared to the majority of the High Court that, even if the origin of the requisite relation was in the household establishment of the master, the concept had widened with the advance of time so as eventually to cover all employment relations. The only restriction engrafted on it by the High Court and Privy Council in the "policeman's case" [9] was to confine it to the "domestic relationship" of master and servant, in contrast to the relation between the Crown and the holder of a public office; but not to restrict it to the relation of master and "domestic servant."

Students of the theory of precedent will find the instant decision of absorbing interest, not only for providing further evidence of the High Court's growing spirit of independence towards the English judiciary, born of increasing confidence and perhaps even a consciousness of superiority; but equally because it opens a window upon the

2 *The Commonwealth* v. *Quince* (1944) 68 C.L.R. 227.
3 *Att.-Gen. for N.S.W.* v. *Perpetual Trustee Co.* (1952) 85 C.L.R. 237; affirmed by the Privy Council, as reported in [1955] A.C. 457. Applied in *Myers & City of Guelph* v. *Hoffman* (1956) 1 D.L.R. (2d) 272 (Ont.).
4 (1959) 33 A.L.J.R. 126.
5 *Inland Revenue Commissioners* v. *Hambrook* [1956] 2 Q.B. 641.
6 *Taylor* v. *Neri* (1795) 1 Esp. 386. See especially Gareth H. Jones' historical investigation in "*Per Quod Servitium Amisit*" (1958) 74 L.Q.R. 39.
7 3 Man & Gr. 88.
8 As reported more fully in 10 L.J.C.P.(N.S.) 314, 315.
9 See n. 3, *supra*.

extent to which the judicial attitude to *stare decisis* is influenced by the individual judge's strength of conviction regarding the substantive issue involved in the case before him. Significantly, Dixon C.J. alone, following with consistent rectitude the same approach as in the "policeman's case," subordinated his personal view (in favour of the claimant) to the ideal of certainty and conformity with the course of English decisions. Among the other dissentients, McTiernan J. simply agreed with the Court of Appeal in thinking that the Privy Council had given its approval to the restrictive view propounded by Eyre C.J., while Fullagar J. reiterated his deep-seated aversion to an action based on premises irreconcilable with his own highly individualistic outlook. But neither he nor, of course, the majority members were prepared to admit that a unanimous decision of the English Court of Appeal, still less of a South African [10] or Scottish [11] appellate tribunal, precluded an independent evaluation—a far cry from the days, not in the very distant past, when this was acknowledged as permissible only in the exceptional case where the decision under review was "manifestly erroneous." [12] In contrast with Fullagar J.'s emphatically disparaging view, Menzies J. recalled Lord Parker's doubt [13] whether, if legislative reform were indeed desirable to remove existing anomalies, it might not be found that the cure lay, less in restricting than in extending the right of recovery to all loss arising out of an inability to perform a contract, so as, *e.g.*, to place a servant in the same position as a master. Windeyer J. pointed to the difficulty of determining in individual cases what kind of service under present-day conditions warranted the ignominious description of "menial" and expressed the view that the action, far from being out of keeping with modern social concepts, performed a valuable function in protecting an employer's economic interest in the continued services of his staff as well as, possibly, in providing an avenue for shifting the cost of disbursements to the culpable defendant.

It is regrettable that, after this thorough review, the High Court evaded the task of furnishing authoritative guidance on what is, perhaps, the most crucial question in this context, *viz.*, the principles governing the measure of recovery.[14] It is not disputed, of course, that a master, if he has an action at all, is at least entitled to compensation for the extra cost of obtaining a substitute for the injured servant or paying overtime rate to existing staff. This, at least, eliminates the paradoxical anomaly inherent in the discarded decision of the Court of Appeal that the protection accorded to the employer should stand in inverse ratio to the loss he is likely to sustain under

[10] *Union Government* v. *Ocean Accident Corpn.* (1956) 1 S.A.L.R. 577.
[11] *Reavis* v. *Clan Lines*, 1925 S.C. 725.
[12] *Waghorn* v. *Waghorn* (1942) 65 C.L.R. 289.
[13] *Admiralty Commissioners* v. *S.S. Amerika* [1917] A.C. 38, 43.
[14] The defendant had for some inexplicable reason contested only the plaintiff's abstract right of action, and conceded the *amount* of his claim which was attributable to disability pay.

this head, because it followed that the more responsible the employee's position, and therefore the greater the difficulty in replacing him, the less chance his employer had to recover for the direct detriment he suffered as the result of losing his services.[15]

The more controversial question as to the master's entitlement to recover for any disbursements made to his servant remains, however, unresolved, and will inevitably provoke further litigation in the future. In this connection, it may be suggested that two considerations should guide the quest for a satisfactory solution.[16] First, it seems undesirable on principle to permit the wrongdoer to take advantage of any compensation received by the injured person from another source; but, secondly, legal rules must be designed so as to safeguard the tortfeasor from double liability. The most efficient, and administratively simplest, method for attaining this twofold objective is to permit the accident victim himself to recover, in the first instance, without permitting a set-off for any compensation which he has received from anyone else on account of medical expenses, pensions or disability pay. The attendant problem of double recovery by the injured person is best treated as a matter to be resolved between him and the third party, and of no concern to the defendant. But, unfortunately, our existing pattern of loss distribution does not permit that easy solution in all cases, because the accident victim cannot recover for items of "expense" unless he has been under a legal liability to pay for them. Hence, if his employer furnishes free medical treatment without his ever becoming chargeable for it, recovery is forestalled.[17] It is in such cases that the master's action for loss of services may with justification be pressed into service in order to prevent the tortfeasor from diverting to himself the fruits of an arrangement intended solely for the servant's benefit.[18] If, however, the defendant has once paid the injured person, without being able to diminish his liability to the extent of any disbursements received from the employer, he should be entitled to protection against double liability. In such cases, the employer must look to the servant himself for repayment, at any rate if the arrangement between them was that it should be refunded in case the latter succeeded in obtaining recompense from the tortfeasor.

The trend of recent case-law does indeed appear to come close to realisation of these objectives. As pensions, disability pay

[15] See my *Law of Torts*, p. 709.

[16] See Parsons, "Damages in Actions for Personal Injury," 30 Aust.L.Jo. 618 (1957).

[17] *Shaeffer* v. *Mish* [1950] 4 D.L.R. 648; *Flaherty* v. *Hughes* [1952] 4 D.L.R. 43; *Moore* v. *Day* (1958) 16 D.L.R. (2d) 371.

[18] An alternative method (of rather unpredictable workability) is illustrated by *Blundell* v. *Musgrave* (1956) 96 C.L.R. 73, whereby an injured rating is initially debited by the Navy Department with the cost of medical treatment, on an understanding that the debt will be forgiven, if he fails to recover the amount from the tortfeasor.

and similar subventions to the accident victim are not, in general, permitted to diminish the tortfeasor's liability towards him,[19] there is much force in the majority view which disputes the employer's right of recovery for those items of expenditure so as to prevent the defendant being made liable twice.[20] Any desirable adjustment as between employer and employee, with a view to forestalling the latter's unjust enrichment by double recovery, is best left to a domestic arrangement between them.[21] As regards medical expenses, however, there is increasing support for allowing the employer to shift this loss to the defendant, at any rate if the former was under a duty to provide such medical care.[22] As already pointed out, there are many situations in which the injured servant could not recover such expenditure himself (because he had not "incurred" it), and most of the decisions allowing such recovery at the suit of the employer proceeded on the assumption that he alone could tax the tortfeasor with its cost.[23] The most satisfactory solution would undoubtedly be to confine it to such circumstances or, at any rate, permit it only when the injured servant has failed to recover it himself in a preceding action or settlement.[24]

John G. Fleming.

[19] *Payne* v. *Railway Executive* [1952] 1 K.B. 26; *Francis* v. *Brackstone* [1955] S.Aust.S.R. 270; *Grant* v. *Carrick* [1956] Qld.W.N. 9. Even "voluntary" payments by an employer or parents, whether intended as a general subvention or in lieu of wages, are not subtracted: *Francis* v. *Brackstone* (*supra*); *Myers & City Guelph* v. *Hoffman* (1956) 1 D.L.R. (2d) 272; *Wollard* v. *Majorhazi* [1959] N.Z.L.R. 433.

[20] *Admiralty Commissioners* v. *S.S. Amerika* [1917] A.C. 38; *I. R. C.* v. *Hambrook* [1956] 2 Q.B. 641, 655–656; *Commonwealth* v. *Quince* (1944) 68 C.L.R. 227; *Att.-Gen. for N.S.W.* v. *Perpetual Trustee Co.* (1952) 85 C.L.R. 237, 292–293 (Fullagar J.); *Commissioner for Railways* v. *Scott* (1959) 33 A.L.J.R. 126, 131 (Fullagar J.), 139 (Taylor J.) and 129 (*semble*, Dixon C.J.). *Contra*: *ibid.*, at 154 (*semble*, Windeyer J.); and the earlier decisions of *Bradford Corpn.* v. *Webster* [1920] 2 K.B. 135; *Att.-Gen.* v. *Valle-Jones* [1935] 2 K.B. 209; *R.* v. *Richardson* [1948] 2 D.L.R. 305. There is no possibility of recovery on a theory of unjust enrichment: *Receiver* v. *Croydon Corpn.* [1957] 2 Q.B. 154.

[21] *Cf. I. R. C.* v. *Hambrook* [1956] 2 Q.B. 641, 657. There is some precedent for the proposition that, where a voluntary payment was made subject to an obligation to refund it out of the proceeds of the damages awarded to the recipient of such bounty, the court may direct a refund to the donor; *Dennis* v. *L. P. T. B.* [1948] 1 All E.R. 779; but *cf. Francis* v. *Brackstone* (*supra*). Where disability pay is a matter of entitlement, there is no reason why the employee should not retain it, because he has in effect bargained for double recovery in the same way as if he had taken out accident insurance.

[22] This has been the consistent thesis of Fullagar J. both in the instant case (*supra*, at 131) and in the policeman's case (*supra*, at 290–291). The basis of this liability seems to be restitutionary rather than tortious and arises in favour of anyone who is under a legal obligation, contractual or otherwise, to provide medical aid to the person injured. This provides a clue to such cases as *Lockett* v. *A. & M. Charles, Ltd.* [1938] 4 All E.R. 170 (*cf.* (1934) 50 L.Q.R. 9). It accords with *Smail* v. *Alexander* (1904) 23 N.Z.L.R. 745, but is irreconcilable with *Commonwealth* v. *Quince* (*supra*).

[23] See, *e.g.*, *Att.-Gen.* v. *Valle-Jones* (*supra*); *R.* v. *Richardson* (*supra*).

[24] American authority, which is singularly sparse both on the question of the abstract right of recovery and the attendant measure of damages, is annotated in 57 *American Law Reports* 2d 812 (1958).

Roberts *v.* Naylor Brothers, Ltd.
Perez *v.* C. A. V., Ltd.

Section 2 (1) of the Law Reform (Personal Injuries) Act, 1948, provides that in actions for personal injuries one half of the benefits which have accrued or are likely to accrue to the injured person in respect of industrial injury benefit, industrial disablement benefit, or sickness benefit for the five years from the date when the cause of action accrued are to be deducted from any damages awarded for loss of earnings. This would seem to be clear and simple. Unfortunately there are two kinds of industrial disablement benefit [1]—if the disablement is assessed at or over 20 per cent., a weekly payment and if at under 20 per cent., a disablement gratuity of a lump sum. No difficulty arises in applying the statute to the weekly payments. But the disablement gratuities are not so simple. The statute can be interpreted in two ways:

1. Simply deduct half of the disablement gratuity.
2. Deduct half of such proportion of the disablement gratuity as equals the proportion of five years to the life expectancy of the injured person.

In *Roberts* v. *Naylor Bros., Ltd.*[2] the plaintiff, who was employed by the defendants, was injured due to the negligence of one of the defendants' servants. His injury was assessed at 5 per cent. and he was awarded a gratuity disablement. Paull J., though aware of the hardship of his decision,[3] decided that the statute clearly indicated that half the gratuity should be deducted.

Edmund Davies J., in *Perez* v. *C. A. V., Ltd.*,[4] was presented with exactly the same problem. Here the plaintiff, employed by the defendants, was injured due to the defendants' breach of section 14 of the Factories Act, 1937, and his disability assessed at 9 per cent. But Edmund Davies J. deducted only half that proportion of the disablement gratuity as equalled the proportion of five years to the life expectancy of the plaintiff.

It is by no means easy to see which of these two interpretations is the correct one. That of Paull J. is certainly the simpler and easier to apply, but this can hardly be sufficient to make the view taken by Edmund Davies J. unacceptable.

In *Perez* v. *C. A. V.*, Edmund Davies J. quotes with approval from Stable J. in *Meagher* v. *Parnall* (*Yate*), *Ltd.*,[5] that:

> "The rights in relation to which this lump sum payment was made were not rights simply in relation to the five-year period, they were rights in relation to the whole period of the possible incapacity. It would therefore be wrong to deduct the whole sum as if it referred only to the five years." [6]

[1] National Insurance (Industrial Injuries) Act, 1946, s. 12 (6) and (7).
[2] [1959] 1 W.L.R. 718; also reported [1959] 2 All E.R. 409.
[3] *Ibid.*, 722.
[4] [1959] 1 W.L.R. 724; also reported [1959] 2 All E.R. 414.
[5] Unreported.
[6] *Perez* v. *C. A. V.* [1959] 1 W.L.R. at 727.

Paull J. preferred the decision of Finnemore J. in *Watkin* v. *C. A. Parsons & Co., Ltd.*,[7] in which he deducted half the lump sum because it was a right which had accrued to him (the plaintiff) within the five years and he had actually received the money and he doubted whether anyone drafting the Act intended any other interpretation.[8]

Paull J. agrees that under his interpretation the recipient of a lump sum is dealt with more harshly than the recipient of weekly payments, for he loses half his whole benefit, instead of half a proportion of his total benefit. But Paull J. thought that the statute was clear. Paull J. also took into consideration the fact that the amount of the gratuity is fixed in accordance with a scale based entirely upon the injury received " . . . it does not take into account the age of a person nor yet his physical condition." [9] So if Parliament has made no provision for taking into consideration the life expectancy of the plaintiff, why should the courts do so? Again he points out that the weekly payment provisions and the disablement gratuity provisions of the Industrial Insurance (Industrial Injuries) Act, 1946, are to be found in two different subsections of section 12 [10] and so there is nothing in the section to show that they were intended to be treated in the same way, as would have been the case if the gratuity provisions had been a proviso to the weekly payment provisions.[11] Nor, decided Paull J., did the plaintiff have a right to weekly payments which is transformed into a lump sum because he is only 20 per cent. disabled.[12] So the plaintiff could not rely on that ground to show that the gratuity should be apportioned between the five years and the rest of his life.

But returning to the actual words of the Law Reform (Personal Injuries) Act, s. 2 (1), it was not necessary for Paull J. to consider all this. The important words are " . . . for the five years beginning with the time when the cause of action accrued." If " for the five years " means " during the five years " then Paull J. is correct, for the right does accrue to the plaintiff within the five years.[13] But if " for " means " for " and not " during " and the phrase is thus given the meaning " in relation to those five years only " then this interpretation is incorrect and two alternatives present themselves:

1. As Edmund Davies J. decided in *Perez* v. *C. A. V.*, deduct half the sum which bears the same proportion to the disablement gratuity as the five years does to the injured person's expectation of life.

[7] Unreported.
[8] *Roberts* v. *Naylor* [1959] 1 W.L.R. at 722.
[9] *Ibid.*, 720.
[10] s. 12 (6), disablement gratuity; s. 12 (7), weekly payments.
[11] *Roberts* v. *Naylor* [1959] 1 W.L.R. at 720.
[12] *Ibid.*, 723.
[13] *Ibid.*, 719. Paul J.: " any right which has accrued or will accrue over the five years."

Or 2. As Edmund Davies J. suggested, but had no need to consider, as it had not been raised by the plaintiff, the Law Reform (Personal Injuries) Act does not apply to a disablement gratuity as this is a right accrued in respect of the plaintiff's whole life and not in respect of five years of his life.[14]

The second of these is not very acceptable for surely it was never intended that there should be no deduction if the plaintiff's disability was assessed at less than 20 per cent. But it is most probable that " for " means " for " and that the decision in *Perez* v. *C. A. V.* is correct. The effect of this is that the judge is left with an unpleasant piece of arithmetic based on arbitrary considerations.

OLGA L. AIKIN.

ESTATE AGENTS' COMMISSION AGAIN

AFTER a flood of cases some years ago, in recent years we have had but a few decisions concerning claims by estate agents for commission. *Ackroyd & Sons* v. *Hasan*,[1] the latest case, has introduced yet a new formula drafted by agents in order to secure commission.

The general approach of the courts is that the commission payable to the estate agent by the vendor of property is to be paid out of the purchase money received by the vendor. If no purchase money is received, no commission is payable, and if, before contracts are exchanged, the vendor decides not to sell after all, he incurs no liability for the agent's commission or expenses.[2]

Although there are general principles of law, the courts have emphasised that the rights of the parties " in each case . . . must depend upon the exact terms of the contract in question . . . "[3] The cases which have come before the courts have generally been concerned with particular forms of words by means of which agents have attempted to secure a vested right to commission notwithstanding the fact that the sale has not gone to completion.

In *John E. Trinder & Partners* v. *Haggis*[4] the words of the contract between agents and vendor were: " In the event of [the estate agents] being successful in introducing a person willing to sign a contract to purchase," commission would be payable. The purchaser signed the form of contract submitted by the vendor's

[14] *Perez* v. *C. A. V.* [1959] 1 W.L.R. at 728.

[1] [1959] 1 W.L.R. 706; [1959] 2 All E.R. 370, Q.B.D.

[2] See *Luxor (Eastbourne), Ltd.* v. *Cooper* [1941] A.C. 108, H.L. But if a binding contract is entered into, and the only reason for non-completion is the vendor's breach of contract, commission will generally be payable: *Fowler* v. *Bratt* [1950] 2 K.B. 96, C.A.; *Dennis Reed, Ltd.* v. *Goody* [1950] 2 K.B. 277, C.A.

[3] Lord Russell of Killowen in *Luxor (Eastbourne), Ltd.* v. *Cooper* [1941] A.C. at p. 124. See too Lord Wright at p. 130, cited below.

[4] [1951] W.N. 416, C.A. (Evershed M.R. and Roxburgh J., Denning L.J. dissenting).

solicitors and returned it to them, but the vendor decided not to sell and no exchange of contracts took place.[5] The Court of Appeal held that by sending the signed contract to the vendor's solicitors the person introduced by the agents had shown his willingness to sign a contract to purchase, and awarded the agents their commission.

In *Ackroyd & Sons* v. *Hasan*[6] the terms of the contract were:

> "... in the event of our introduction of a party prepared to enter into a contract to purchase ... you will allow us commission."

Winn J., after saying that there was no case precisely in point, went on:

> "*John E. Trinder & Partners* v. *Haggis*[7] is so very near to the present case that I feel difficulty ... in taking a view of the present case which arrives at a result opposite to that arrived at by the majority of the Court of Appeal in that case."

Yet the learned judge found himself able to distinguish the case by reason of "the philosophy implicit in the judgments in cases decided in 1950 and 1952, rather than by any express direction from the Court of Appeal."

The basis of the decision of Winn J. is to be found in the following words:

> "I am now constrained ... to regard ... the phrase 'prepared to enter into a contract' as a nullity. If that phrase is sought to be construed against the owner of the property, in my opinion it amounts to a nullity in law, so that one ignores the phrase and construes the document, as a matter of law, as though it did not contain the words 'a party prepared to enter into a contract,' but contained in place of those words, 'a party who enters into a contract.'"

It is suggested that, although the actual decision may be justified, the learned judge has surely gone too far in saying that the phrase "amounts to a nullity in law." The speeches in *Luxor (Eastbourne) Ltd.* v. *Cooper*[8] make it clear that:

> "the decision ... must depend on the consideration of the language of the particular contract, read in the light of the material circumstances of the parties in view of which the contract is made."[9]

One of the material circumstances is of course that the form of words is proffered by the agent, and must therefore be construed against him if ambiguous. Furthermore, we are not here dealing with a "standard-form contract" which the prospective vendor must

[5] Neither party is bound until contracts are actually exchanged: *Eccles* v. *Bryant* [1947] 2 All E.R. 865, C.A.
[6] [1959] 1 W.L.R. 706; [1959] 2 All E.R. 370.
[7] [1951] W.N. 416, above.
[8] [1941] A.C. 108, H.L.
[9] [1941] A.C. at p. 130, *per* Lord Wright.

accept, or do without the service he seeks; we are dealing with a form of contract which is not in accordance with the usual practice of the profession and which a knowledgable vendor, or one properly advised, would reject. It is worth bearing in mind that the justification usually offered for the high rate of commission payable to estate agents is that the commission is received only for successful sales, and that nothing is received for abortive efforts, of which there are inevitably many. Nevertheless, if a vendor clearly agrees to pay the agent the full rate of commission for, say, merely putting details of the house in the agent's shop window, it is submitted that (in the absence of fraud or misrepresentation [10]) the commission will be payable.

In the instant case, it is possible to construe the contract in the vendor's favour without having resort to the dubious doctrine of "a nullity in law." The agents were entitled to commission on the introduction of a party "prepared to enter into a contract. . . ." As in the earlier case referred to,[11] the prospective purchaser signed his part of the contract, which his solicitor sent to the vendor's solicitor. But the vendor's solicitor did not send the vendor's part of the contract in exchange. No contract was therefore entered into, and the purchaser could have withdrawn what was no more than an offer at any time. Just as a person "ready, able and willing to purchase" means one who purchases,[12] so a person "prepared to enter into a contract" can mean one who actually enters into a contract; for until a contract is actually created, the prospective purchaser may cease to be prepared to enter into a contract and may withdraw his offer.

An important question not discussed in the present case is whether there was in fact ever any contract on the terms proffered by the agents. On July 23, 1956, the vendor orally agreed to employ the agents to sell the property. On July 24 the agents wrote to the vendor setting out the terms on which the agents relied. The report states simply that the vendor "accepted the services of the plaintiffs on the above terms." It may be that the agents put forward their terms at the oral interview and that the letter was in truth a confirmation of the terms, but it would have been worth specifically finding the facts of the transaction. Denning L.J. analysed the factual situation and the law with impressive clarity in his dissenting judgment in *Trinder* v. *Haggis*,[13] and it is to be hoped that one day the point will be taken and fully argued.

AUBREY L. DIAMOND.

[10] Or undue influence?
[11] *John E. Trinder & Partners* v. *Haggis*, above.
[12] *i.e.*, one who completes the purchase.
[13] [1951] W.N. at p. 417.

Forgive Us Our Trespasses

Armstrong v. *Sheppard and Short, Ltd.*,[1] as the Master of the Rolls observed, is a case "not . . . without interest or without difficulty." The defendants wished to construct a sewer beneath a private pathway running behind the plaintiff's house, in order to carry effluent from the defendants' premises through the plaintiff's land to the public sewer in the highway. The plaintiff was asked for his permission. He raised no objection, but, in the words of the county court judge, he:

> "did not realise when he spoke to the [defendants] that he, the plaintiff, was the owner of any part of the said pathway. This being so, he would naturally not give permission to the [defendants], because he did not know that he had the right to do so; neither, however, would he object, because he would not know he had the right to object either."

The judge found, however, that the defendants were:

> "justified in supposing that, so far as the plaintiff was concerned, he knew what his rights and position were and had deliberately consented to what the defendants were doing."[2]

The defendant company then laid the sewer under the pathway, and from the end of 1957 it was in use. Neither the construction nor the use of the sewer caused any hardship to the plaintiff.

The plaintiff later learnt that his registered title included and had included at all material times the strip of pathway behind his house, and he asked the company to remove the sewer and a manhole constructed at that spot.[3] The company would not, and the plaintiff brought an action in the county court for damages for entry on his land and the construction of the manhole and an injunction to restrain the further discharge of effluent.

The county court judge refused an injunction, and the Court of Appeal agreed that he was right. Evershed M.R.—who gave the only judgments in the appeals[4]—accepted the plaintiff's argument that:

> "a proprietor will not be debarred, on the ground of acquiescence, from asserting his legal rights against one who is shown to have infringed them, unless it is also clear that, at the time when he did so acquiesce, the proprietor was aware of his proprietary rights."

[1] [1959] 2 All E.R. 651; [1959] 3 W.L.R. 84, C.A.

[2] The plaintiff had charged his registered land to mortgagees who were in possession of the Charge Certificate; the court did not point out the simplicity of confirming the boundaries of registered land by postal application to H.M. Land Registry without any need to bother the mortgagees.

[3] The plaintiff in evidence denied that he had ever given any permission whatsoever to the defendants, but his evidence was rejected, it being "clear that he attempted to mislead the court."

[4] The appeal and cross-appeal were heard by differently constituted courts, but this is of no significance.

He found authority for this in *Ramsden* v. *Dyson*[5] and *Willmott* v. *Barber*.[6] Still, he refused to exercise his discretion to grant an injunction—first, because the damage was trivial, on the plaintiff's own admission, and also on the " formidable grounds " that he misled the defendants and " attempted to mislead the court." The plaintiff also contended that the damages (nominal damages of 20s.) awarded in the county court were too low. The damages were limited to the technical trespasses caused by the discharge of effluent from a reasonable time after the plaintiff had notified the defendants to cease up to the hearing. The Court of Appeal held that 20s. was an adequate sum.

The defendants, however, were themselves dissatisfied with the the result in the county court and gave notice of cross-appeal, desiring that the—

> " judgment should in any event be reversed . . . so far as it directs that there should be judgment for the plaintiff for £1 with costs. . . . And . . . the [defendants propose] to ask the Court of Appeal to enter judgment for the defendants . . . "

In other words, the company did not wish to pay the cost of the case, or, presumably, to be threatened with a series of actions for trespass—trespasses no longer purely technical, but in defiance of the ruling of the courts on the parties' rights—and the possibility of the grant of an injunction at a future date.

The Court of Appeal agreed that the plaintiff's approval of the presence in the land of the pipes and the manhole—even though the plaintiff was unaware of his rights—could provide a defence to an action of common law trespass. The problem for the defendants, however, was to justify the continued passage of effluent along the sewer, which, incidentally, became by accession the property of the plaintiff along that section.[7] Here the cross-appeal failed.

Just as the plaintiff was not bound by acquiescence—and so might have got his injunction—so the defendant could not claim the constructive grant of an easement by acquiescence. And the court was clear that " if the subject-matter which is alleged to have been granted is an interest in land, then it cannot be done by parol only." The plaintiff's " permission " was given in the course of a telephone conversation. Of course, as they pointed out, surrenders are different—for example, a right to water can be gained by occupancy, lost by abandonment. In consequence, while the defendants could successfully claim that the construction of the sewer was no trespass, since the plaintiff had agreed to it—even though he mistook his rights—more than that was denied to them. The

[5] (1866) L.R. 1 H.L. 129.
[6] (1880) 15 Ch.D. 96.
[7] Although technically impeccable, it is harsh law, to say the least, to allow A, who had encouraged B to place property on A's land for a certain purpose, to revoke his permission because of his own mistake as to his rights and yet keep the materials of B's labour.

defendants seem to have argued strongly, however, for the creation of a gratuitous licence personal to the parties, and irrevocable during the plaintiff's tenure. The court reaffirmed the orthodox view [8] that there are licences coupled with a grant, contractual licences and bare licences. It was possible to give an irrevocable licence by contract, the court said, but then:

> "it must have the necessary qualities of a contract, binding on the parties: it must be supported by consideration and must, in other respects, be the subject of a contract."

Here, as counsel for the defendants conceded, there was no contract and it was held that adequate notice had been given for the revocation of a gratuitous licence—if the plaintiff's words indeed amounted to this.

There seems little real justice in the plaintiff's success, but the decision itself moves coolly over the tricky terrain where property, contract, licence and estoppel exercise uncertain sovereignty. It is important to realise that the appropriate doctrines are quite narrow, however, and that no "general question" of licences or estoppel is answered here for the first time.

It may be that in this type of case, the discretion of the court in granting an injunction will always be important in practice, but it is worth going back to consider why Evershed M.R. believed that prima facie the plaintiff was entitled to relief. The plaintiff consented, and on the strength of that the defendant altered his position by building. Why did no doctrine of estoppel by acquiescence operate to bar the plaintiff?

Estoppel covers an immense field and its procedural veil obscures an uncertain amount of substantive law. The doctrine of estoppel:

> "is to be found in the laws of all civilised nations that if a man either by words or conduct has intimated that he consents to an act which has been done, or that he will offer no opposition to it, although it could not have been done lawfully without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. . . . If a party has an interest to prevent an act being done, and has full notice of its having been done, and he acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous licence." [9]

Nobody would deny the validity of this exposition, but the present difficulty occurs where a person makes a representation by

[8] *Winter Garden Theatre (London), Ltd.* v. *Millennium Productions, Ltd.* [1947] 2 All E.R. 331.

[9] *Cairncross* v. *Lorimer* (1860) 3 Macq. 829, *per* Lord Campbell L.C.

active conduct or by passive acquiescence in ignorance of his own proprietary rights. In the present case the plaintiff was unaware of his ownership of the pathway and therefore, stated the court, citing *Ramsden* v. *Dyson* and *Willmott* v. *Barber*, estoppel would not operate against him. But, with respect, is this not too simple a view of the situation? In *Willmott* v. *Barber*, Fry J. stated that "the acquiescence which will deprive a man of his legal rights *must amount to fraud*." This is quite clear when a man makes an active or passive representation knowing the true position. But surely a man can fraudulently acquiesce in a course of conduct even though he is in ignorance of his own proprietary rights? There is no accepted standard definition of fraud for all purposes and the line between estoppel and fraud is often difficult to draw. Fraud does cover, in many cases, statements made "recklessly, careless whether they be true or false with the intention that the statement should be acted upon." [10] It is not difficult to envisage a case where a person may make a representation recklessly (not merely negligently) to another in ignorance of his proprietary rights and that other acts upon it. On the findings in the county court it is doubtful whether the plaintiff in the present case had acted fraudulently in this sense. However, had he acted in such a manner then the fact that he was not aware of his proprietary rights could not assist him in the question of estoppel.

In this respect *Hopgood* v. *Brown* [11] is very relevant. There estoppel applied against a company who had expressed approval of building plans submitted to it by an adjoining owner, as the result of which the garage erected on the adjoining land encroached on the company's land. The company acted in ignorance of its proprietary rights yet was estopped from claiming the land upon which part of the garage now stood even though in that case there was no fraud in the sense specified by Fry J. in *Willmott* v. *Barber*. In order to evade the issue of fraud, the Court of Appeal distinguished between estoppel by representation, on which the case turned, and estoppel by mere acquiescence; only in the latter case was fraud, and so, the court said, a knowledge of one's rights, a condition of estoppel. It is possible to regret, while recognising, so fine a distinction between words and deeds. But for present purposes *Hopgood* v. *Brown* does show that a person acting in ignorance of his own proprietary rights (the company would not have agreed to the plans had they known that the garage encroached their boundary) can be estopped. Thus, if in *Armstrong* v. *Sheppard* the plaintiff's conduct had been tantamount to a "fraudulent" representation or acquiescence, in principle estoppel should apply.[12]

[10] *Cf. Derry* v. *Peek* (1889) 14 App.Cas. 337, 374.

[11] [1955] 1 W.L.R. 213. A decision of the Court of Appeal including Evershed M.R., but not cited in the present case.

[12] The doctrine of estoppel by acquiescence, of course, will only operate where the party who has built or laid out money on land believes either that it is his

Because estoppel was not applied in *Armstrong* v. *Sheppard*, connected problems which might have been raised were not considered. For example, what would have been the future position of the defendants had the plaintiff been debarred by acquiescence? Would the court have been prepared to compel the plaintiff to grant a valid easement for the passage of the effluent even though there was no contract? [13] Would the estoppel have operated against the plaintiff only, or would it have extended to third parties who acquired the plaintiff's land with notice of the defendants' rights? [14, 15] These important matters still await judicial consideration.

D. J. Bentley.
G. Dworkin.

own or that he will get an interest in it. This condition seems to have been satisfied, since the defendants' rights could have amounted to an easement, that is, a recognised interest in land.

[13] *Cf. Dillwyn* v. *Llewellyn* (1862) 4 De G.F. & J. 517 at 521, *per* Lord Westbury L.C.

[14] The defendants expressly conceded " for present purposes " this point.

[15] For a careful discussion of these problems by R. H. Maudsley, see 20 Conv.(N.S.) 281, esp. 291 *et seq.*

CORRESPONDENCE

Editor-in-Chief,
The Modern Law Review.

Dear Sir,

Hungarian lawyers have always pursued with great interest legal writings published abroad, among those the *Modern Law Review* edited by you. This *Review* is highly esteemed by lawyers in this country on account of its scientific standard and objectivity.

The reading public of your *Review* was the more surprised to read an article in the March 1959 issue by Stephen Schäfer, published under the title "Some Basic Principles of Hungarian Criminal Law," which contains incorrect statements in respect of Hungarian law-making and administration of justice.

We are prompted both by a desire to promote objective scientific research and by our regard felt towards the Editorial Board to draw your attention to the incorrect and erroneous statements in the article.

It is alleged by the author that as a result of Soviet pressure Hungarian criminal law was subjected after 1947 to Soviet ideas. The writer should be aware (for at the beginning of the article he touches upon the subject) that in Hungary the Criminal Code in force today had been enacted as Act No. V of 1878 supplemented by several new Acts; this Code had undoubtedly been strongly influenced by the German and Belgian criminal codes. As it is very unlikely that Hungarian law-making could have been influenced by Soviet ideas some eighty years ago, the relevant exposition of the writer is rebutted by itself. It is only obvious that as a consequence of the changes which have occurred in our social and economic conditions the necessity of drafting a new code of criminal law has arisen long ago, which work—contrary to what the writer alleges—has not been discontinued but is being actively carried out and in a relatively short time the draft will be submitted to the National Assembly.

Having clearly stated the fact that there is of course no question of either Hungarian law-making or administration of justice being under "Soviet pressure," it is obvious that in drafting new legislation that of other countries and the experiences thereof are taken into consideration by applying the method of scientific comparison, as is the usual procedure all over the world. Instructive and useful experiences gained in this way are, as a matter of course, made use of and applied. The experiences of the Soviet Union which can be usefully applied in the conditions of our country are in this sense also taken into consideration especially taking into account the similarities of social development in the two countries.

In respect to Act No. II of 1950—providing for the new general rules of criminal law—it is complained by the writer that it refuses to accept any assistance from modern criminology; in making acceptable this allegation of his he refers to some views of several Soviet writers dating back to the thirties; it is a well-known fact that these views have been since risen above by Soviet law-making, administration of justice and jurisprudence long ago. Now all over the world, in the Soviet Union, in the people's democratic countries among those in our state an intensive and thoroughgoing research in the science of criminology is being carried on; it is conducted not as an end in itself but with an objective of rendering it useful in respect both of law-making and administration of justice. When examining the relevant legal writings it appears that research work in criminology is in the upswing all over the world; there is, however, not a single Code in Europe which resorted to the results of criminological research to the required extent—excepting the field of juvenile delinquency, where, however, criminological aspects, as in other European states, were fully applied in this country in Decree Law No. 34, of

1951. All these considered, it still cannot be maintained that the general provisions of the Hungarian Code of Criminal Law refuse to accept any assistance from modern criminology; the construction of the notion of crime, that of culpability, the individual assessment of the culprit which serves as a basic principle when inflicting penalties are, in fact, manifestations of criminological aspects. It may suffice to refer to section 50 providing for the objectives of the infliction of penalties:

> "(1) Penalty should be applied in order to protect the working people, to reform and educate the perpetrator, furthermore, in general, to make members of the society refrain from committing crimes—
>
> "(2) Penalty shall be inflicted—having in view the general objective of the Act—within the limits provided for in it to the extent that it be commensurate with the social danger of the crime, with the danger to society inherent in the personality of the perpetrator, to the conditions otherwise affecting the perpetrator in a favourable or unfavourable way and to the injury committed (to conditions aggravating and attenuating the penalty)."

Thus in Hungarian law, crime is constituted by a socially dangerous unlawful and culpable act or omission for which a penalty is provided for by law. The definition of this concept comprises not only the objective constituents but, contrary to what is alleged in the article, the subjective ones as well (culpability). As it is clear from the above law as well as in practice both objective and subjective constituents are fully taken into account; nevertheless, considering the issue between classical objectivism and modern subjectivism referred to by the writer it does not make concessions to modern subjectivism and consequently Hungarian statutory provisions do not accept that security measures based on the dangerous character of the perpetrator were justified, but in conformity with the idea of the rule of law in the constitutional state they start from the basic concept of assessing not the subjective characteristics of the perpetrator but the act itself.

The problem of social danger is dealt with by the writer in a whole chapter. In this regard he objects to the very criminological aspect the want of which he took exception to in previous passages. It is admitted that the notion of social danger is the foundation of the whole structure of modern European criminology. One cannot disagree with this view but if it is so why does he not interpret this concept in the correct way when Hungarian law is considered? In this context he makes reference to page 2 of section 1 of Act No. II, 1950, on the general notion of crime, subsequently making the erroneous allegation that the fact how far and in what respect the act or omission is dangerous is decided by the courts who, in turn, follow the directives of the party. In order to elucidate the position as it really is, it will suffice to add page 3 of the above section: "Crime shall be a socially dangerous act for which the infliction of a penalty is provided for *by law*."

Thus it is clear that the problem whether an act or omission is to be regarded as a crime is not decided in Hungary by judicial practice but by statutory provisions. In addition to the general rules, the special part of the Hungarian criminal law is codified in several hundred sections; these sections give the definitions of crimes—the statutory specification of the constituents of the crime in question—and include provisions as to the kind, extent and limits of the penalties which can be inflicted on the perpetrator.

It is equally clear from the notion of crime referred to above that social danger has a wider meaning and within its scope exclusively those acts are qualified as crimes and are indictable which are declared as such in statutory provisions by law-making organs. It should repeatedly be pointed out that the definition of a crime is not the function of judicial practice but of codified provisions the overwhelming majority of which—as pointed out at the outset—dates back to eighty years ago.

The writer arrives at erroneous conclusions also when discussing the functions

of the Attorney-General. The Attorney-General is the guardian of the rule of law and in this capacity he can avail himself of the legal remedies as well as of the legal protest as an extraordinary remedy against a final judgment which procedure is known in all legal systems under different names and forms. It should be mentioned in this context that this function is of French origin, introduced by the *Code d'instruction criminelle* at the beginning of the last century; thus it is not an innovation in legal hierarchy. It certainly does not aim at loosening the faith in the finality of judgments. I should like to add a few words with respect to the exceptions taken by the writer as regards the operation of criminal law in regard to persons, attempts and parties to a crime.

As far as the operation of the Code in regard to persons is concerned it should be pointed out that persons infringing the economic and social order are prosecuted in all states—irrespective of their nationality. Hungarian criminal law is not excepted from this general rule either.

As to the attempt at crime, legal provisions in the past had provided for lighter penalties than in the case of a completed crime. This provision had been interpreted in judicial practice to the effect that the highest limit of penalty which could be imposed on the completed crime could not be resorted to, but the highest limit less one day could be inflicted. In practice, its significance was apparent only in cases of death penalties and imprisonment for life when criminal law provided for an imprisonment of fixed duration in the category of attempts. The new provisions are based on equal treatment, but a more lenient penalty on attempts than on the completed crime is not excluded in a given case. It should also be recalled that provisions to this effect do by no means constitute a "novelty," for section 2 of the French *Code Pénal* based on Acts from 1810 and 1832 also provides for equal treatment.

We come across a complete confusion of concepts when the writer examines the problem of parties to a crime, although statutory provisions relating thereto are much clearer and more explicit. It should be pointed out as one of the characteristic features of the analysis that the article dwells upon the concept of the "organiser of a crime," a notion completely unknown in the provisions of Hungarian criminal law.

As to the allegations of the writer regarding the duty to inform and to people's control these are equally erroneous. In Act No. VII of 1957 on people's control its organisation is laid down and its section 21 runs as follows:

> "(1) Persons participating in the work of the people's control shall be responsible to ascertain the verity of the evidence supporting their findings and to communicate the facts as they really are without any misrepresentation.
>
> "(2) When discharging their duties connected with this capacity, persons participating in the work of the people's control shall be subject to the same criminal responsibility as the members of the civil service."

It is clear from the statutory provisions now referred to that a person guilty of libel cannot escape the criminal prosecution for his or her act.

In conclusion we should like to point out that as a rule we welcome and we consider it useful if the problems of our legal system are analysed in legal writings published abroad—assuming the requirements of scientific objectivity are duly observed. In our opinion an incorrect and erroneous picture is presented in the article in respect of law-making and administration of justice in Hungary It is for this reason that we deemed it necessary to rectify these errors.

We would appreciate it very much if the readers of the *Modern Law Review* would be informed of the contents of my letter and if it would be published in your paper.

I avail myself of this opportunity, to express to you, Mr. Editor-in-Chief, my high consideration.

Yours faithfully,

Eugene Benedek,

Budapest. Secretary-General, Magyar Jogász Szövetség.

REVIEWS

Loyalty and Security: Employment Tests in the United States. By Ralph S. Brown, Jr. [Yale at the University Press; London: Oxford University Press. 1958. xvii and 524 pp. (with index). 48s. net.]

Political and Civil Rights in the United States. By Thomas G. Emerson and David Haber. Second edition by the authors. [New York: Dennis & Co. Inc, Buffalo. 1958. Two volumes: Vol. I, xxii and 1–758 pp.; Vol. II, vi and 759–1536 pp. (with index). $36.]

In this country where attention has from time to time been focused upon the disloyalty of Government-employed scientists such as Fuchs and Nunn May, as well as upon that of others such as Pontecorvo or Maclean and Burgess who were either not government employed or were not scientists, we are unfortunately only too familiar with the conflicts of loyalties which have caused so much trouble in the U.S.A. There they have almost given rise to a sub-branch of jurisprudence as well as to a political upheaval which for some years set the whole country by the ears. Indeed readers of this review will already be familiar with a treatment of this topic on a comparative basis by Mr. David C. Jackson which appeared in Vol. 20 (p. 364).

In spite of the important series of cases referred to above and some others, such as that of John Lang, against whom not only was the charge of disloyalty never made out, but never even formulated in detail, this problem has remained within quite a narrow compass in this country compared with the U.S.A. How deep and how wide the repercussions have been there appears from this admirable study by Professor Brown of the Yale Law School—parenthetically it may perhaps be noted that such success as has been achieved in bringing American public opinion back onto an even keel in respect of this matter of loyalty and security tests has been in some measure due to the way that the waves of hysteria were resisted by means of competent and objective analyses of the factual situation in the law schools of the great universities: among which Yale deserves an honourable mention; for the second important work noticed in this review emanates from that university also.

The proliferations of this topic are so wide that even to pursue them in the most summary way would take much more space than one has at one's disposal. The field of employment which has been affected by the loyalty and security tests includes not only most employments by Federal and State authorities but a wide area of private employment where some of the tests imposed have been "sufficiently systematised to be called programs."

The history of the matter also shows a development from the criterion of a rather crude loyalty approach to a much more workable type of test based on security. This was necessitated by the fact that although "the attack on disloyalty . . . started in good faith, and on a narrow front, it widened to include people who share with Communists any preference that to some influential group seems disloyal."

Again, as Professor Brown points out, the "consequence of failing to pass a loyalty test is more severe than the denial of employment: it also carries with it a substantial stigma . . . it is nothing more or less than a circumlocution for treason." This point is one of such importance that it naturally has to be followed out in some detail, especially as the trend towards substituting security

for loyalty tests though well developed among the more responsible federal authorities tends to be unobserved by the smaller type of employer to whom it may indeed appear to be a distinction without a difference. Moreover in particularly sensitive departments it may be considered desirable to impose tests of both types: this was the case in the Defence Department which is so vast as to account for half of all federal employment.

There are obvious difficulties in the way of administering these tests whether based on loyalty or security—and however much they may be kept apart in theory there is bound to be a good deal of overlapping in practice—and these are very well brought out by Professor Brown. Thus the investigation is bound to depend on the disclosures of informers and secret agents whose future value will be lost if their identity is discovered: hence the extreme reluctance of the security services ever to allow the accused to be given the full details of the case made against him which obviously increases the difficulty of effective defence. Moreover since the accused and his legal advisers can for the same reason never be given the opportunity of cross-examining the informers what is perhaps the most valuable of all the ways of testing the reliability of evidence is lost. Moreover in this type of work, altogether apart from the fact that persons of very shady reputation seem to gravitate into it, emotional factors are so often at work that it is almost impossible even for the honest witness to free himself from bias. Some of the examples given in this book of dismissals on evidence so biased and unreliable that it should not have hanged the proverbial dog really make one begin to despair of human nature.

Again the vindictiveness with which the condemned are persecuted is almost unbelievable: thus steps have been taken to deprive former employees of the Communist Party in the U.S.A. of social security benefits and of unemployment compensation. While, as we have already seen, the stigma of a disloyalty finding may pursue the unfortunate victim so that he may find himself ineligible for almost all employment. It is one of the ironies of history that these events should be taking place in the U.S.A. among the descendants of refugees from the political and religious intolerance of Stuart England.

Another important point which emerges is that many of the criteria which would be used by a careful employer in coming to a decision as to an appointment to a post of responsibility naturally get onto the loyalty-security test sheet. "A tabulation by major categories of derogatory information showed that in only about 25 per cent. of the 'cases' was there material bearing on disloyalty" . . . the remainder "could have been handled as ordinary suitability cases." But being handled as loyalty-security cases the stigma point operates and the unfortunate man tends to be victimised in the way we have already mentioned.

Nevertheless when all has been said, and I have hardly mentioned all the main points in the indictment, the need for some sort of security arrangements is inescapable. Professor Brown's criticism indeed is not entirely destructive: even when he is most devastating he clearly has his eye on the need for, and possibility of, improvements in the arrangements. Thus the constructive elements in this book are of great importance, and would repay careful study by those who are in authority.

The basic point which emerges is the unnecessary width of the field covered by the tests. As Professor Brown says, "the essential thing to do with security programs is to restrict their coverage." In non-sensitive employments "the desirable thing to do with loyalty programs is to get rid of them." In the restricted area within which the tests are really necessary they can be applied intelligently and sympathetically, "always bearing in mind that security can never be made absolute." There are other values which have to be weighed in the scale against security, and when due allowance for these has been made it should be possible to assess security at its true value, and decide just how far, and within what limits, it will pay us to impose the tests.

I reviewed the first edition of the *Political and Civil Rights Case Book* in 17 M.L.R. at p. 584, to which I would refer the reader for an outline of its scope and an attempt to appreciate its value. The encomium which I then passed

on it receives some confirmation in the fact that a second edition has already been called for.

The space devoted to current materials and decisions in the first edition was an indication, if any were required, of the important practical place which this subject takes in modern American legal administration. The death of Senator McCarthy and the decline of McCarthyism in the interval does not seem in any way to have diminished the practical urgency of these problems. Messrs. Emerson and Haber now require two volumes for the assembly of their material, and the 300 additional pages which this represents by no means measure the book's actual growth, for the old chapter 2 on Fairness in Governmental Problems which was in fact concerned with personal liberty and which ran to some 150 pages has been omitted, on the ground that it is adequately treated in the textbooks on criminal law, and certain other cuts have been effected, so that the total amount of new material cannot be far short of 500 pages—it is not surprising to find the authors in their Preface to the new edition referring to "the enormous expansion of court decisions with a corresponding output of legal analysis and criticism." The principal expansions are contained in the chapters on Freedom of Speech which have been reorganised and a good deal rewritten as a result of decisions under the Smith Act and in that on Discrimination which has been substantially added to as a result of the cases arising from the educational difficulties at Little Rock and elsewhere, and also because of the hotting-up of the colour-bar controversy in other directions. On the other hand an appreciable portion of the new material derives from the sort of improvements which every capable author naturally makes when producing a new edition. Thus chapter 1 on the Right to Security of the Person has been much improved by the addition of a substantial section on the Historical Development of Federal Power.

Personally I regret the disappearance of the old second chapter which, with its sections on Police Violence and Coerced Confessions, on Searches and Seizures (with Wire Tapping) and Self Crimination, to mention only a portion of its subject-matter, I had found most interesting. It is true that some of this material, such as Self Crimination, does now appear in other parts of the work. But some of the other omitted material is also of importance, such as that concerned with the Right to Comment on Judicial Proceedings. One would have thought that with two volumes at their disposal the authors might well have retained it, even if in a summarised version.

The section on the Right to Comment was actually rather superficial for such an important topic. The subject is of course very much bound up with contempt of court, a subject which in the U.S.A. has developed on somewhat different lines from those followed by our courts. This has been particularly the case in connection with the committal of lawyers for the over-zealous conduct of their cases. It is obvious that when political liberties are so continuously under test in the courts as they are in the U.S.A. the lawyers concerned will themselves tend to come under attack, and should be entitled to the benefit of any doubt there may be as to whether they have overstepped the bounds of courtesy and good sense in the handling of their cases. This has not always been the case in the U.S.A. as has indeed been recognised by one of the authors of this work in his "Lawyer Troubles in Political Trials" (60 Yale L.J. 1 with Harper). It is therefore rather disappointing to find the whole subject of contempt, with its implications for the liberty of the Press and in other directions, dealt with somewhat cursorily.

In view of the interest aroused in this country by the passing of the Obscene Publications Act, 1959, most English lawyers will probably wish to turn first to the recent pronouncement of the Supreme Court on this topic in the cases of *Roth* v. *United States* and *Alberts* v. *California* (354 U.S. 476) which received a good deal of attention in the English Press, because the alleged obscenity of *Lady Chatterley's Lover* was involved in *Roth's* case. This was the first time that the problem of obscene publications and the constitutionality of statutes dealing with the subject had been directly before the court. Among a number

of points of substance under discussion the one which will undoubtedly be of the greatest interest to English lawyers is the decisive rejection of the *ratio decidendi* laid down by Lord Cockburn L.C.J. in *Hicklin's* case (1868) L.R. 3 Q.B. 360. The members of the court were clearly of opinion that a work alleged to be obscene must be judged as a whole and not on the basis of selected passages, and that attention must be paid to its likely effect on the average reader, not upon young people or other particularly susceptible segments of the community. It will be seen that in the result the legal position in the U.S.A. approximates to that aimed at here by the 1959 Statute, though we shall naturally have to wait some time before we have authoritative discussion on its provisions. It is also significant that a minority of the court would have gone much further, and were prepared to hold that both Federal and State statutes imposing restrictions on freedom of the Press on the basis of obscenity are unconstitutional.

It is interesting to observe that measured by the amount of new material made use of in it the section in this book devoted to the loyalty test for employment provides one of the most sensitive areas in the civil liberties field. This part of the *Case Book* can indeed be profitably read in conjunction with Professor Brown's *Loyalty and Security*, for several of the more important cases referred to there, such as *Cole* v. *Young* and the *Chasenow* case are discussed here in detail. The text of the principal documents and letters in the *Oppenheimer* case will also be found here.

Speaking generally one finds that the claim of the authors that "the trend towards restriction of individual rights reached a peak in 1954, and since that time has somewhat receded" is borne out. They seem to be of opinion that the more liberal judgments of the Supreme Court are consequent upon rather than causative of this trend: one would have thought that the accession of Chief Justice Warren to the court had been of great, if not decisive, importance in establishing it: indeed the authors note that under him "the court has been more willing than in the immediate past to impose limits upon governmental restraint of the civil and political rights of the individual." They add, however, "that many of the Supreme Court's recent decisions have been put upon narrow technical grounds rather than upon basic constitutional principle," and point out that in the result "many of the problems remain in a fluid state, essentially unresolved." One should perhaps note also that the decisions have continued to be given by such small majorities that small changes in the composition of the court might well reverse the recent trend decisively.

C.

On Law and Justice. By Alf Ross, Professor of Law at the University of Copenhagen. [London: Stevens and Sons, Ltd. 1958. xi and 377 and (index) 5 pp. £2 2s. net.]

Professor Ross is a distinguished member of the School of Scandinavian Realists. His work is more constructive than that of the irascible Hägerström and in its construction it is much more detailed than that of the excitable Lundstedt, but it rests upon the same foundations. The study of law, according to the author's Preface, must follow the patterns of observation and verification which are traditional in empiric science; legal notions must be interpreted as conceptions of social reality "and as nothing else"; the idea of an *a priori* principle of justice as a guide for legislation must be rejected; the idea of legal cognition as a specific normative cognition must be rejected and legal thinking must be interpreted in terms of *is*-propositions. To the present reviewer these foundations seem insecure.

The Scandinavian school, as we know, vehemently rejects all philosophies which claim for law any sort of absolute, *a priori*, moral validity. Professor Ross, however, also explicitly rejects the Kelsenian "formal" treatment of the notion of validity, because "purely logical-mathematical" statements are

not scientific in his sense of the word "science." "Science" deals with empiric reality and "scientific" statements must be verifiable by experimental test. He makes a brilliant and fascinating, if not quite convincing, attempt at a "scientific" account of validity in terms of effectiveness. Valid rules are those which actually are operative in the mind of the judge, "because they are felt by him to be socially binding." To say that a rule is "valid" means that, if proceedings are initiated in an appropriate case, this rule will form an integral part of the reasoning underlying the judgment. This, we note, avoids the extreme "rule-skepticism" of Jerome Frank. But, as Professor Ross's acute mind perceives, it contains its own difficulties: (i) It imposes a distinction between "the effectiveness that is the validity of law" and the wider "effectiveness" of ordinary language, which takes in the effect of a legal rule not only on the mind of the judge but also on the conduct of the subjects. (ii) It implies that statements concerning "the effectiveness that is the validity of law" are necessarily hypothetical future statements ("*if* a case should arise, the judge *will* apply this rule"), while statements concerning "effectiveness" in the ordinary sense are categorical statements of past or present fact. (iii) It denies validity to norms of competence (that is, rules defining powers or prescribing formalities) unless there is attached to them, as we should say, a sanction (be it only the sanction of nullity) for excess of power or neglect of formality. We may add, (iv) it makes it difficult to give an account of what we should call a *wrong* decision by a court. Suppose an Act of Parliament empowers subordinate bodies to make by-laws imposing fines not exceeding 40s. and suppose one such body makes a by-law imposing a fine of 40s. and another makes a by-law in the same matter imposing a fine of 50s., we should say (and so far Professor Ross would, though for different reasons, be with us) that the former by-law was valid and the latter was invalid. Suppose, now, that a court, *per incuriam*, applies the latter by-law (and there is no appeal). Those of us who take a "formal" view of validity would have no difficulty in maintaining our distinction between the two by-laws; we should say that the error into which the court had fallen did not make valid that which was invalid. But Professor Ross (we imagine) would have to formulate a more complicated statement to the effect that, while the latter by-law was still (probably) invalid, because (probably) future courts would not repeat the error, he had in the past been wrong, as regards this one instance, in holding it to be invalid. Professor Ross's doctrine not only demands that ought-propositions should be reduced to is-propositions, a task which can be attempted in several ways, it also involves the enormously difficult problems of reducing logical-mathematical statements to statements of factual probability.

Granting, for the sake of argument, that science deals only with empiric reality, we can agree with Professor Ross that it should be possible, although difficult, to construct social sciences with the same methodological purity as the physical sciences, and that among these there could be a science of jurisprudence, which would examine the way in which law works as an instrument for social purposes and would provide scientific rules stating when and how the policy-maker can effectively use the specifically legal techniques of control. This would be an important study and Professor Ross in his last hundred pages has important things to say about its scope and its possible methods. But such science has its limits. "The scientist does not himself decide on an attitude. The premise of evaluation which governs his researches is not his own" (p. 320). The only sense in which such scientific jurisprudence can apply the word "good" to law is with reference to its efficiency for its purpose, whatever that purpose is. For scientific jurisprudence under Hitler the best law would be that which eliminated the greatest number of Jews in the shortest possible time. Can Professor Ross avoid this conclusion? He is much more clearly aware than Lundstedt of the ambiguities underlying such concepts as "the welfare of the community" but even he fumbles (p. 324) with the analogy of the doctor, which

is a false analogy, because there is fair agreement among doctors on the desirability of preserving life and health and on the meaning of health. His chapter on "The Idea of Justice," however, indicates more clearly what his answer must be. Here he stands firmly with Thrasymachus: the only possible meaning of "justice" is conformity with existing law. Nor will he allow us to use other notions, such as "righteousness," to express our approval or disapproval of the existing law. Like Hägerström he attacks moral metaphysics as vehemently as legal metaphysics. It is not enough for him that moral values have no place in legal science; they are not scientific, they are chimaeras; they have no place anywhere. So (we must conclude) save by intuition there is nothing to choose between the morality of Hitler and that of Jesus Christ. Science has its limits but outside of science there are no values anywhere. To the present reviewer this is a conclusion to reach with despair and not with rejoicing.

Occasionally Professor Ross slips. On page 226 after discussing theories of the nature of a testament he says that in his opinion it "is" a disposition of transfer—which is surely a lapse into the "juristic essentialism" which he has repudiated. On page 316 he says that methods of persuasion can be used equally in the service of good and evil—forgetting that his science can give us no discernment between good and evil. Like all scientists he seems to have at least an implied preference, a value-judgment, in favour of technical efficiency and in his concluding pages he even allows himself to use such evaluating words as "progress," "emancipation," "enlightenment," "false conceptions and prejudices." Perhaps these slips are a sign of grace.

There are some minor points on which criticism may be offered. The observation on *stare decisis* (pp. 88–90) show how an intelligent foreigner can be misled by reading too much into native criticisms. A generation ago our writers were inclined to present our judicial treatment of precedents as a matter of strict logic. Modern critics have made us aware that the judge has a considerable freedom to distinguish. Out of this Professor Ross develops the conjecture that "the doctrine of *stare decisis* is only an illusion" (which contradicts what he himself says on page 284). He quotes Paton on *Donoghue* v. *Stevenson*; but he does not appreciate that the result of *Donoghue* v. *Stevenson* and subsequent decisions has been to establish a principle with, admittedly, marginal uncertainties but with a wide central area of authoritative certainty. (On page 138 he goes too far, for England at least, in saying that "the judge may even disregard obvious limits set by the words or the intention of the legislator.") What he alleges on page 193 to be a "current distinction" between rights of disposal and rights of claim is not (so far as the present reviewer is aware) important in Anglo-American jurisprudence. In his long and valuable chapter on "Interpretation" he makes good use of modern semantic criticism but he does not refer to Glanville Williams' articles (in 61 and 62 L.Q.R.) on "Language and the Law."

There are many passages which call for special praise: the treatment of Hegel, Stammler and Marx; the criticisms of Natural Law theories; the onslaught on the *Willenstheorie* (the arguments are familiar to readers of Hägerström and Lundstedt but the presentation is admirable); the criticism of Duguit and Lundstedt for their too hasty conclusion that because rights do not exist they are not to be discussed—for Professor Ross, too, of course, rights do not "exist" metaphysically, but he admits that the concept of a right is a tool of legal thought and that the situations to which lawyers apply it need analysis and classification, a task which he excellently performs on broadly Hohfeldian lines.

Almost unqualified praise is also to be given to the Englishing of Professor Ross's work. We can find less than a handful of obscurities in the use of the English language—on page 69, l. 10 from foot, "idea" in the sense of the German *Idee*, which is nearer to the English "ideal"; on page 193 "the right of disposal" for the right to use and enjoy (to "have at one's disposal"); on page 216 "legal acts, also called dispositions" for, presumably, *actes juridiques*,

Pollock's "acts-in-the law"; and on page 261 the statement that "evidence cannot be a criterion of truth," which at first sight seems a piece of forensic cynicism but is actually a misuse of "evidence" for "self-evidentness." Moreover, we remark with particular approbation that what the author, translator and editor have given us is not a mere translation but virtually an English edition in which Danish technicalities of no moment to the English reader have been eliminated and references and illustrations more useful to him have been incorporated.

This book offers us our best and most authoritative exposition and development of a philosophy which, even if we find it inadequate, we recognise to be important and influential. It is throughout enriched and enlivened by the learning and reflection of a great scholar and powerful thinker. It must not be neglected.

A. H. CAMPBELL.

ASPECTS OF JUSTICE. By SIR CARLETON KEMP ALLEN, Q.C. [London: Stevens & Sons, Ltd. 1958. x and 310 pp. (with index). 25s. net.]

SIR C. K. ALLEN'S many admirers will be glad to have the lectures on Aspects of Justice which he delivered to the University of Bristol in 1954 made available in this convenient volume together with two articles on the Conscience of Counsel and Matrimonial Cruelty from the *Law Quarterly Review*, and a lecture on the Literature of the Law given to the Royal Society of Literature in 1956. The Bristol lectures dealt with the Grammar of Justice, Justice and Mercy, and Justice According-to-Law. To these has been conveniently added an article on Justice and Expediency which originally appeared in *Interpretations of Modern Legal Philosophies* (1947), and also a chapter on Justice and Liberty apparently specially prepared for this volume.

As is so often the case with collections of this kind the quality and value of the various chapters vary a good deal. Even those on Aspects of Justice which provide the core of the volume are somewhat uneven in quality. But all are written with the author's old brilliance of style and persuasiveness of argument. For students of jurisprudence they will provide stimulating additional reading, and to older lawyers who like to wander away from the reports and digests they will come as a welcome excursus, sometimes leading into fields of not too difficult theory, sometimes drawing attention to little realised "aspects of justice."

Among the lectures on Aspects of Justice, the most substantial is the Grammar of Justice (53 pp.) in which the author attempts an analysis of justice into its essential elements: it is also the best. In the first place the author holds that justice is an element in "the moral part of adult man's nature." In the second place, and I think the author would say of greater practical moment, it is a social virtue, and as such its purpose is to maintain "an equilibrium in human affairs." Finally, justice "postulates *equality of consideration* for all who come within its scope."

It may be objected that this analysis is not a logical one, and is incomplete, but its discussion enables the author not only to present attractively some of the views advanced by Plato and Aristotle on the subject, together with occasional references to more modern authorities such as Montesquieu and del Vecchio, but also to refer perhaps a little too lightly to such doctrines as "natural justice," which he shrewdly points out has a much more limited and practical part to play in English law than in the continental systems of jurisprudence where it has, among the philosophic jurists, been so much canvassed.

In this Grammar of Justice chapter I liked best the discussion of the part played by retribution in the administration of the Criminal Law. Allen's view is that the basic fact here is nothing more nor less than anger, and anger is an

emotion which even if morally justifiable in certain circumstances, seldom leads to good results either for those who feel it or those who suffer from it. "The primitive motives" with which we are here involved "are all the more distasteful because of the artificial rectitude in which they are dressed."

This lecture ends with a somewhat cursory discussion of "conceptions of justice" which one would have expected to find at the beginning. However, the discussion is conducted with an urbanity worthy of Socrates, to whom reference is so often made in these pages, and the shrewdness of Sir Carleton's insight can be appositely illustrated from his comparison of the treason trial conducted by Sir Edward Coke in London, *tempore* James I, with those conducted in Moscow by Vishinsky *tempore* Stalin. The remaining chapters in this section are slighter. That on Justice and Expediency contains a particularly good analysis of Stammler's contribution to Jurisprudence, but comes to grips rather faint-heartedly with the problem of expediency, accepting somewhat unexpectedly Herbert Spencer's equating of expediency with happiness. The chapter on Justice and Liberty is disappointing also. The author has been such a doughty protagonist of a rather old-fashioned conception of liberty during the contemporary era of "triumphant" bureaucracy that one would have expected to get here a particularly careful statement of his position, and one would hardly have expected the somewhat sardonic approach which we find in this chapter, in which liberty comes off decidedly second-best to justice. It is even more surprising to find in consecutive pages the following statements, "Mr. Cranston contends—rightly as I would respectfully agree—that freedom is not a power, as some philosophers have maintained": "I would gratefully accept Mr. E. F. Carritt's simple definition of liberty as 'the power of doing what one would choose without interference by other persons' actions.'" Indeed the whole chapter gives the impression of having been put together rather hurriedly, and the author's *élan* seems to have faded before, in the last four pages out of forty-seven, he reaches the objective, "Liberty and Justice."

The excellent article on "Matrimonial Cruelty" from the *Law Quarterly Review* is here supported by a short and not very convincing Introduction, together with two slight chapters on Cruelty to Children and Cruelty to Animals. These are obviously important subjects, and if they could have been worked over with something of the care lavished on Matrimonial Cruelty, the result could not fail to have been valuable, but one has the impresssion that it was a matter of filling out. Thus had he been writing with his usual care, Sir Carleton could hardly have stated that "cruelty is an ingredient of rape . . ." at any rate without a rather fuller explanation of the meaning which he attaches to the word "ingredient" in this connection.

The essay on the Conscience of Counsel is concerned with a celebrated Australian murder case, which gave rise to a number of unusual incidents, the strangest and most unfortunate of which was the action which had to be taken against the prisoner's counsel who had, during the course of the trial, obtained evidence of his client's guilt, but had nevertheless asked the jury to believe that another person was the murderer. When he afterwards disclosed this fact to an eminent fellow-member of the Bar in a professional capacity, the embarrassment of the latter can easily be imagined. This of course provides the *leitmotif* for "The Conscience of Counsel." This *cause célèbre* must have made a poignant impression upon Sir Carleton Allen when a boy in Australia, and his narration is remarkable for its dramatic vigour as well as for the insight of his commentary on the characters and motives of the *dramatis personae*. It would be extremely inaccurate to thank him for rescuing this article from the pages of the *Law Quarterly Review* since many of us use its volumes as much, or more, than any others, and yet one is certainly glad to have this fascinating story at one's disposal in rather more accessible form.

C.

Russell on Crime. Eleventh edition. By J. W. Cecil Turner. [London: Stevens & Sons, Ltd. 1958. Two Vols.: (1) cli, 1–908 and (index) 56 pp.; (2) x, 909–1843 and (index) 56 pp. £10 10s. net.]

Here we have further results of Mr. Turner's devoted work on converting Russell into a modern textbook. There is of course also the more conventional scholarship concerned with incorporating the effect of recent cases and statutes. With regard to the latter it need only be said that the task has been carried through with the care and industry which one would expect from this editor. There have been an unexpected number of important decisions during the past eight years, and these together with a number of earlier cases not previously noted have increased the new citations to over 400! There have also been a number of criminal statutes: some of these, such as the Sexual Offences Act, 1956, being simply consolidatory in character, others such as the Homicide Act, 1957, creating important new law. These naturally receive detailed attention.

Appreciating the importance of all this work I nevertheless took most interest in the modernising process. Here Mr. Turner has made some progress but not as much as one would have hoped. In reviewing the previous edition, which was Mr. Turner's first (see 15 M.L.R. 260), I discussed the line which he had taken at some length, and, in collaboration with my colleague Mr. J. E. Hall Williams, took some pains to make suggestions for further improvement. Mr. Turner seems to have ignored this review. I say this because a serious mis-citation, that of Dr. Glanville Williams' article "What is a Document?" (11 not 2 M.L.R.) remains uncorrected, as does the statement that "there is no reported decision in England on the question whether drunkenness can be considered as negativing the *animus furandi* in larceny" which again appears (p. 90) without any reference to *Ruse* v. *Read* [1949] 1 All E.R. 398: to both of these I drew attention. One of the main objects of any reviewer who takes his work seriously is to assist an author or editor to improve his work, and it is, to say the least, discouraging to find one's efforts in this direction completely ignored. Many of the criticisms and suggestions which I made in the review in question are equally pertinent in respect of the present edition; I do not intend to repeat all these though I shall have occasion to refer to some of them in what follows. Some of the matters in question were no doubt obvious matters of comment and I am glad to notice that they have been dealt with, at any rate in part.

The main improvements made in the present edition are the rewriting of some text, the omission of some detail, the rearrangement of some material, and the improvement of chapter headings.

There is considerable rewriting throughout the book. Indeed Mr. Turner has not hesitated to rewrite quite a number of passages which he had himself contributed to the previous edition. In doing so he usually achieves greater clarity and concision—some of the material on *mens rea* is noteworthy for this. Sometimes however, and naturally, the rewriting has involved considerable expansion, as in the case of insanity and the M'Naghten Rules. Here the important report of the Royal Commission under Sir Ernest Gowers provided important material, and to this Mr. Turner naturally refers. He has not thought fit however to add to the short list of important articles on the subject which appears in footnote 23 on page 119. Several articles of outstanding value were published during the discussion which followed this report, so that Mr. Turner's already inadequate bibliography has become even more deficient.

One would have expected some discussion of the impact of the new defence of diminshed responsibility on the administration of the M'Naghten Rules, as well as a careful analysis of section 2 of the Homicide Act itself which creates it. Mr. Turner attempts neither, but in respect of the latter point refers instead to expositions of the Scottish law on the subjects which are unlikely to be readily available to English lawyers.

As one would expect Mr. Turner's main preoccupation with the Homicide Act is over section 1 and the abolition of constructive malice. He dislikes the preservation of implied malice and is able to show historically that the two words were used interchangeably by judges and textbook writers. He naturally deplores the decision of the Court of Criminal Appeal in *R.* v. *Vickers* [1957] 2 Q.B. 664; [1957] 2 All E.R. 741, suggesting a possible and more liberal construction of "implied" malice than that taken by the court which would have saved the life of Vickers, and have been more in accordance with the policy of the statute. I find myself in full agreement with his argument.

Mr. Turner admits that the Homicide Act has simplified the defence of provocation and he has to some extent revised the voluminous section on this subject, but he retains material which seems to me out of date, and this explains why he still requires thirty-eight pages for his exposition.

The rearrangement of the material on homicide is one of the most useful features of this edition. The chapter headings of the older editions can only be described as absurd. All the most important homicides were dealt with in one enormous chapter of 220 pages—this contained only three subheadings, *viz.*, on general principles, on the *actus reus*, and on the *mens rea*. We now have five separate chapters;—on general principles, on murder, on suicide, on manslaughter, and on offences relating to childbirth.

This is typical of an obvious and very proper preoccupation with titles and headings. The subtitle of Russell from the beginning was "A Treatise on Felonies and Misdemeanours." This had for some time been inaccurate since in recent editions more and more space has been, very reasonably, devoted to summary offences, and the subtitle has now been quietly dropped.

These summary offences are of course almost entirely the creatures of statute, and the problem of deciding whether *mens rea* is an essential element is undoubtedly that of the greatest general interest. It is good that this fact has now been recognised in a new section on *mens rea* in relation to such offences. This has however been kept very short and general (4 pp. only); the editor contenting himself with a reference to the more detailed discussion in the literature on the subject. This policy seems to me to be mistaken: after all Russell is the standard textbook, running to some 2,000 pages.

It is of course exceedingly difficult to know how far to go with the inclusion of summary offences. As far as I can judge Mr. Turner has not expanded this aspect of the criminal law in this edition. He has however much improved the presentation of some of this material. Thus the section on Road Traffic Offences now appears with some of the more important provisions of the Road Traffic Act, 1930, printed in the text. This replaces a rather higgledy-piggledy selection of sections from the same statute which appeared under the heading "Conspiracy and Incitement to Murder"! The revised material still appears in the same chapter: it is, however, incomplete in at least one important particular, for, while the offences of driving while unfit by reason of drink or drugs are dealt with, that of driving without a proper insurance is omitted. Until the 1956 Road Traffic Act this offence also carried an automatic suspension of the convicted person's driving licence. Incidentally some of the provisions of the 1956 Act are spatchcocked into the 1930 Act in a confusing way.

A further criticism may be made in respect of the section headings in Chapter 98 (Nuisances in Connection with Premises), that for Lotteries having been omitted. The material which has been revised to include the Small Lotteries Act, 1956, is now included under the heading "Betting on Tracks"!

Another chapter in which the rearrangement of the material is particularly welcome is that on Rape and the Defilement of Females. Incest, previously in the chapter on Unnatural Offences, now, properly, appears here. The valuable codification carried through by the Sexual Offences Act, 1956, was no doubt "a matter of inducement" to this improvement.

It is not surprising in view of Mr. Turner's well-known interest in larceny to find him a good deal preoccupied with the recent decisions on that subject. Thus *Moynes* v. *Coopper* [1956] 1 Q.B. 439; [1956] 1 All E.R. 450, is referred to

no less than ten times, though whether it really disposes of *R.* v. *Ashwell* (1885) 16 Q.B.D. 190 as Mr. Turner suggests seems to be doubtful. If he is correct why retain the twenty-five-page appendix on the latter case?

I repeat my criticisms of the sections devoted to Infants and Corporations in connection with the Criminal law. These and much else which is much in need of revision, as indicated previously, appear in the new edition practically untouched. I appreciate that Russell is a very large book and that the pressure on editorial time is no doubt great, but if Mr. Turner's enthusiasm could be spread a little more widely an up-to-date Russell would doubtless appear more rapidly.

It remains to notice that the chapters on Attempts and Parties have been brought from the end of the work into the forefront. The proper placing of these topics is an old subject of controversy, but I am inclined to agree with Mr. Turner's decision seeing that we are here concerned with a practitioner's textbook: for students I think this arrangement is confusing. These two chapters are substantially unchanged and do not call for comment.

In conclusion I should perhaps, after my stricture on the undue expansion contained in the last edition, draw attention to the fact that Mr. Turner has succeeded in reducing his text by some forty pages, though the book is in fact somewhat longer, since the index is printed at the end of both volumes, a useful innovation.

C.

Family Law. By E. L. Johnson, m.a., ll.b.(Cantab.), Lecturer in Law at King's College, Newcastle-upon-Tyne, in the University of Durham. [London: Sweet & Maxwell, Ltd. 1958. 325 and xx pp. 35s. net.]

The Law and Practice of Divorce and Matrimonial Causes. Fourth edition. By D. Tolstoy, of Gray's Inn and the South-Eastern Circuit, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1958. 500 and lv pp. £2 10s. net.]

Mr. Johnson's book was one of the first of recent attempts to discuss as a whole the principles of English law applicable in the field of family relations. The approach is not new, but not since the earlier editions of Lush on *Husband and Wife* has there been, until recently, a clear and readable account, in something like modern terms, of the whole of the law even as it concerns husband and wife. For this the professional examining bodies, with their blinkered concentration on isolated fragments of the law, must bear a heavy share of the responsibility. Not least of the merits of the revived and extended approach is that of relegating to a small, if over-frequented, corner of this wide field the circumstances in which the parties to a marriage may be permitted by law to contract another marriage during the lifetime of their former spouses. Experience of teaching family law shows that the legal problems arising from and during marriage are not only of greater jurisprudential value but of far greater interest to students than the somewhat dreary catalogue of matrimonial offences by those who fail in some of their closest human relations.

Mr. Johnson's early chapters indeed show a fresh approach, and clearly embody the results of individual research. Unfortunately, whether for lack of time or some other reason, the quality of these early chapters is not maintained. Chapters 4 and 5, on the property rights of husband and wife, which should be the backbone of the book, are particularly disappointing, and are inadequately collated with each other. Since no fewer than seven new statutes on family law have come into operation since publication, there is opportunity for the thoroughgoing revision of the book which could make it suitable for university use.

Mr. Tolstoy's work is justifiably held in high esteem as a concise and accurate guide to practitioners. It is also the accepted guide to students of that part of family law which the Council of Legal Education has seen fit to prescribe as an examination subject. This fact cannot reflect unfavourably upon its author, but may cause somewhat furious thinking about the type of training laid down for legal practitioners, as an unusually accurate publishers' blurb rightly claims that compactness is achieved by stating the law as it is, without discussion. The first twenty-five pages deal with the jurisdiction of the courts, a traditional beginning but one of doubtful value to those with no more knowledge of the substantive law than they have gleaned from the Sunday newspapers.

In all, nearly one-third of the book is devoted to practice and procedure, and about a quarter to the reproduction of the text of statutes and rules, including the all-important sections 12 and 17 of the Married Women's Property Act, 1882. Mr. Tolstoy has, indeed, always extended his field to include some discussion of property relations between husband and wife, and the guardianship of infants. In the present edition, these topics rate two and half and six and a half pages of text respectively, compared, for example, with nineteen pages on damages and costs. There is considerable discussion of the provisions for the maintenance of dependants during joint lives, but no mention of the Inheritance (Family Provision) Act, 1938, or its amendment in 1952. If this is because the book is concerned with actions in the Divorce Division, presumably future editions will include the Matrimonial Causes (Property and Maintenance) Act, 1958, but not the Inheritance (Family Provision) Act. Nor is it only the division of work among the courts that is accepted as the criterion for classification. Thus in general, Mr. Tolstoy does not attempt to deal with the historical development of the law, but he divides the grounds for nullity of marriage into two classes, (a) those at common law or under statute, and (b) those under the Matrimonial Causes Act, 1950, s. 8. History is indeed a treacherous guide, and becomes even more so at close quarters. A supplement was issued with the present edition covering the text of the Matrimonial Proceedings (Magistrates' Courts) Bill. This has not yet passed into law, and seems unlikely to do so in its original form, but since this edition of Tolstoy on *Divorce* was published there have been five statutes in the field which Mr. Tolstoy covers and a new set of Matrimonial Causes Rules, which will presumably be embodied in later supplements or another new edition.

O. M. Stone.

Traffic Victims. By Professor Leon Green. [Northwestern University Press. $4.00.]

Accident cases are fought in the United States by specialist lawyers who are sometimes regarded by their colleagues as not quite respectable but who bring to their cases a great deal of scientific knowledge and legal acumen. More cases are fought out than in this country. Trial by jury is still largely the rule and in the result there is in most states a considerable delay in bringing cases to trial. The courts too have varied in their attitude to tort cases in the last hundred years. They have swung from a tendency to treat liability as based on trespass to the person and almost absolute to the view that the individual must bear the risks inherent in progress from which he benefits and back again to the feeling that it does not pay to place the risks of our industrial society on its victims. Problems of proof are great in traffic cases since there may be no independent witnesses, the protagonists may not have survived and the testimony of the most honest witness of a sudden emergency is notoriously unreliable.

From these circumstances there has arisen a widespread feeling in the United States that far too often justice is not done in such cases. Liability, or

"third-party" insurance is not a sufficient answer because it is just in establishing liability that the uncertainties of fact and law make their impact. Professor Leon Green in this stimulating book therefore suggests that compulsory loss insurance should be introduced so that all traffic victims would be compensated without proof of negligence, the quantum of damages being assessed by a Master. The damages would be payable by the insurers of any motor-vehicle involved and a further scheme would cover cases where the vehicle could not be identified. The insurance companies would be parties to the proceedings instead of their existence being artificially disregarded. Under Professor Green's plan damages for pain and suffering and the first $100 of any loss from personal injury and property damage would be excluded. Only those attempting or committing suicide or injured while committing any criminal offence other than a traffic offence would not be covered by the scheme.

Professor Green believes that this scheme could be operated without exorbitant premiums and that it should be coupled with more vigorous prosecution of offenders.

While not all the conditions described in this book are reproduced in this country, it is worth considering whether we can really be satisfied that traffic victims and their dependants receive proper justice in every case. Cases like *Bray* v. *Palmer* [1953] 1 W.L.R. 1455 and *Frances* v. *Parkinson* [1954] 1 W.L.R. 581 illustrate vividly the difficulties of proof. It would appear to be in keeping with modern ideas that all the victims of traffic hazards should be fully compensated. But whether the whole cost of the scheme should be borne by owners of motor-vehicles rather than by extending national insurance is more debatable.

JOHN MONTGOMERIE.

"THE MOTOR" GUIDE TO THE LAW. By A BARRISTER. With Decorations by WREN. [London: Temple Press, Ltd. 1958. xi and 115 pp. 10s. 6d. net.]

THIS book is appropriately respectfully dedicated "To all those motorists who sometime did or may yet encounter the law." Happy and fortunate indeed must any modern motorist be who does not find himself, or herself, sooner or later firmly and assuredly enmeshed in the thicket and undergrowth of the law relating to the apparently ever-increasing volume of traffic on our progressively overcrowded and congested roads.

As a general guide for the ordinary motorist this short book, written expressly for the layman and enlivened by a number of sketches in lighter vein, is admirable. In the first Part will be found some very useful practical advice regarding the purchase of a motor-car, and then the second Part deals with a somewhat frightening and massive array of criminal offences and penalties regarding the driving, parking, insurance, taxation, lighting, construction and use of private motor-vehicles. The third and final Part is devoted to matters of procedure with special reference to magistrates' courts and appeals.

Such is the volume and comprehensive nature of the law relating to motoring offences that it is an almost impossible feat for any 1959 motorist to take his vehicle on to the road and drive more than a few miles without infringing the law in some way or other! Although ignorance of the law is no excuse in the courts, this book will certainly demonstrate how very ignorant in this respect any and every reader of this *Guide* can be, so long, of course, as he or she is transparently honest in testing and assessing his or her knowledge in the light of the contents of even this small work. The only consolation, of course, is that some are more ignorant than others and even lawyers, judges and the most learned authors by no means know everything.

Even if a motorist has no particular desire to know very much about the

law governing his own driving and conduct on the roads, he can still be strongly recommended to invest in a copy of this *Guide*, because the more everyone knows about motoring law the less likely road accidents will become. A few hours reading this book may well reward any motorist with many extra years of safe and accident-free driving.

M. R. R. Davies.

Problems of Public and Private International Law. Transactions for the Year 1957. Vol. 43. [London: The Grotius Society, Pump Court, E.C.4. 1957. xxix and 172 pp. Price to Non-Members 35s. net.]

The 1957 volume of the Transactions of the Grotius Society provides exceptionally varied and interesting fare. The Mexican Oil Dispute is very frequently referred to as a significant precedent in the field of the law relating to expropriation of foreign property. Professor Wortley's concise and attractive presentation of the facts of the case and of its background is therefore of considerable practical importance. The same is also true of Mr. Brandon's paper on legal deterrents and incentives to private foreign investments. Some of the latter seem to have escaped the learned author, as, *e.g.*, death duty benefits resulting from investment in foreign immoveable property or income tax benefits resulting from the application of the taxation on a remittance basis. But even if these are taken into account, one may well doubt whether investments in underdeveloped countries, to which the paper is confined, have really become much more than a risky gamble for the average private investor. Mr. Johnson's fascinating paper proves that the law relating to piracy is still a matter of practical importance in our days. To reveal the topic of Mr. Unger's lecture on "the unknown province of the conflict of laws" would be unfair to the stimulating title chosen by the learned author. It may therefore suffice to say that it contains a critical examination of two propositions which many specialists on the conflict of laws have for long thought to be axiomatic truths. Many of Mr. Unger's readers will after perusal of his paper throw these axioms into the dustbin reserved for superstitions. Dr. Bowett traces carefully the requirements for the use of force in the protection of nationals after destroying the myth that such use of force is forbidden by article 2 (4) or by article 51 of the Charter of the United Nations. Dr. Micklem's paper on the philosophical tradition in international law is an inspiring restatement of the natural law doctrine. Dr. Simmonds' lecture on "Some English precursors of Hugo Grotius" conjures up the pictures of men who have been undeservedly forgotten, without unduly overstressing their historical importance. In fact, Dr. Micklem's thesis might find notable support from Dr. Simmonds' findings: these predecessors of Grotius were forgotten because unlike Grotius their approach was merely a "plain, empirical" one, making them lack in that "persuasive power" which in the case of Grotius "stems largely from a continual comparison between the ideal, reasoned, philosophical basis of the law with the state of the law in practice" (p. 156). The lesson should not be lost on our contemporaries. Dr. O'Connell's paper on the interaction of international and constitutional law in federal states, which concludes the volume, indicates some of the special problems that Australian lawyers have to face in consequence of the federal structure of Australia.

The volume includes a full reprint of two thoughtful after-dinner speeches. The legal advisers to the Foreign Office will, however, no doubt, be a little surprised to read that Lord Strang spoke of them as being "in constant demand as draughtsmen"!

E. J. Cohn.

THE LAW OF PARTNERSHIPS AND VOLUNTARY ASSOCIATIONS IN SOUTH AFRICA. By B. R. BAMFORD, B.A.(Oxon.). [Cape Town: Juta & Co., Ltd. 1958. 95s. 6d. net.]

THIS useful book fills a gap in South African legal writing. As one would expect from its author, it is well written, pithy and, in places, ingenious. He has exhaustively summarised the case-law dealing with partnerships and analysed it with wit and acumen. Mr. Bamford is treading familiar ground but he does it with distinction especially as regards arrangement. He has a neat way of summarising the facts of cases by way of illustration (see, for instance, the cases on the distinction between loan and partnership on pp. 8–9).

Voluntary associations have been little discussed by writers in South Africa. The law there has sometimes taken a different turning from that of England. One example is the South African rule that associations may become corporate bodies at common law without registration, provided they have perpetual succession and property distinct from that of their members. There is a statutory exception in the case of associations carrying on business for gain. In an excellent and brief discussion (pp. 90–94) Mr. Bamford points to the analogies with what he calls the "quasi-incorporation" of associations in English law with the help of the trust concept.

The author argues that a member of an association, whether a *universitas* or not, may sue it for wrongful expulsion. The majority of members of an association, he argues, have no inherent power to amend the constitution, to expel a member or to alienate property, but have an implied power to make administrative and executive decisions. It is not always easy to reconcile these principles, and a glance at a recent theoretical work, such as H. A. J. Ford's *Unincorporated Non-Profit Associations*, will show that there are a good many unsolved problems in this branch of the law over which Mr. Bamford has skated rather lightly in his stimulating but short part on associations (65 pp.). Perhaps he will take up some of these problems in the next edition, and also reconsider the need to reprint the whole of the Co-operative Societies Act, 1939, the Friendly Societies Act, 1956, and the Building Societies Act, 1943, as respectively amended—useful as are the lists of decisions given at the end of the Act in each case.

A. M. HONORÉ.

ELLIS, PATENT LICENSES. Third edition. [New York. 1958.]

THE late Mr. Ridsdale Ellis produced in 1936 and 1943 two editions of a work called *Patent Assignments and Licenses*. His third edition was intended to be divided into two volumes of which the first, *Patent Assignments*, appeared in 1955. Mr. A. W. Deller, the editor of Walker on *Patents*, has now produced the companion volume, *Patent Licenses*. A perusal of the table of contents (compared with the title headings of the American *Restatement*) shows that the limited subject implied by the title has received wide coverage and the author has included chapters giving guidance on borderline relevant subjects such as restraints of anti-monopoly statutes, anti-trust statutes and arbitration for settling controversies. To a United Kingdom reader Chapter 19, Provisions in Patent Licenses Relating to Foreign Countries, is of special interest. If asked by an English business man to draw heads of agreement recording discussions with a United States patentee before the latter returns to his country, such reader might be glad of the reminder in section 6 that "an agreement to give a licence on terms 'to be agreed upon' is not enforceable and that where an essential element of a contract is reserved for future agreement, no legal obligation as to such element arises until such future agreement is made." On the other hand a United Kingdom practitioner might find the limited scope of the book a handicap in giving interim advice, *e.g.*, to an English technician employed

in the United States contemplating returning to this country and needing advice in regard to an invention he had made influenced by but not exclusively dependent upon his work there. Must he reveal the invention to his United States employer with a view to a patent and licence, or how should he proceed? A reference to the index is not helpful, the nearest entry being "Employer and Employee, Government as Employer, section 96." It is necessary to know that the United States term which will yield some of the desired information is "Shop-rights." Sections 67 to 73 devoted to that heading will be found useful. But to complete his advice to the client, the practitioner will have to inquire about relevant "know-how." Webster's dictionary classes that word as colloquial and defines it as technical skill. The passages indexed under Technical Development of Invention do not solve the practitioner's problem and he must then discover that, because they are "outside of the field of statutory protection, Trade Secrets, protectible at common law and in equity and by contract," they form the subject of a separate volume entitled *Trade Secrets* published in 1953. In the preface to that volume the author observed about Trade Secrets that "in the absence of contract the basis for their protection is fair play and business ethics." That leads to a discussion in that volume of unfair competition.

The work confines itself to the discussion of principles, making reference to over one thousand decided cases and does not attempt to supply any precedents or draft clauses. There are a few references to the United Kingdom *Reports of Patent Cases* but they are somewhat obscured by the unusual abbreviation POR.

L. A. Ellwood.

Income Tax Law and Practice. By Cecil A. Newport, f.a.c.c.a., Fellow of the Institute of Taxation, and H. G. S. Plunkett, Barrister-at-Law (formerly one of H.M. Inspectors of Taxes). Twenty-eighth edition. [London: Sweet & Maxwell, Ltd. 1958. 434 pp. 30s. net.]

This edition maintains the standard of its predecessors. While the reader who is familiar with former editions will therefore need no recommendation, other readers may wish to have some idea of what distinguishes this book from the numerous other works on the subject. It is fair to say that it is better on the practice than on the law: for the person who is actually making a claim, or preparing an account, the numerous points of detail and examples worked out with figures are likely to be invaluable, while in order to discover the law on a general principle, the reader would perhaps do better to look elsewhere. This means that it is a book specially suited for accountants, and for solicitors who have to deal with matters of everyday importance as regards tax. It is truly amazing that so much information can be packed into so small a book. A student, however, might find it heavy going if his interest lies in the law, rather than the accountancy, of taxation.

D. C. Potter.

The 1958 Income Tax Legislation. By A. S. Silke. [South Africa: Juta & Co., Ltd; London: Sweet & Maxwell, Ltd. 1958. 170 pp. 48s. net.]

This compilation of South African Income Tax statutes is intended for use with the same author's book Silke on *South African Income Tax*. In addition to the text of the legislation it gives tax tables and notes on recent decisions.

D. C. Potter.

BIBL. LONDIN. UNIV.

THE SALE OF FLATS. Second edition. By E. F. GEORGE, LL.B. [London: Sweet & Maxwell, Ltd. 1959. xxiv and 217 pp. and index. 27s. 6d. net.]

THE first edition of this excellent little book was reviewed in 21 M.L.R. at p. 219. It is a tribute to its usefulness that a new edition has become necessary so soon. The author has taken the opportunity to deal with new statute and case-law. The basic problem of how to make positive obligations run with the land is reconsidered in the light of *Halsall* v. *Brizell* [1957] Ch. 169, which stressed the rule that a person exercising an easement is bound to observe any conditions attached thereto. Insurance of common parts and third-party insurance are dealt with more fully and the author rightly points out the desirability of requiring comprehensive insurance and not just fire insurance in leases of flats. A most interesting chapter has been added on co-operative schemes and there are new precedents.

In an appendix Mr. David Piercy, a chartered surveyor, gives an up-to-date review of the subject from his point of view.

JOHN MONTGOMERIE.

Books and Publications Received

DAS SCHWEIZERISCHE PATENTRECHT. Blum/Pedrazzini. Vol. 2. [Stämpfli & Cie. Sw.Frs. 95.]

ANNUAL BULLETIN OF HOUSING AND BUILDING STATISTICS FOR EUROPE 1957. [United Nations: Economic Commission for Europe. 1958. 46 pp. Geneva. 3s.]

CLARKE HALL AND MORRISON'S LAW RELATING TO CHILDREN AND YOUNG PERSONS: Second (Cumulative) Supplement to Fifth edition. By A. C. L. MORRISON, C.B.E., and L. G. BANWELL. [London: Butterworth & Co. (Publishers), Ltd. 1959. xv and 176 pp. 20s.]

FRAGEN DER RECHTSANGLEICHUNG IM RAHMEN DER EUROPAEISCHEN GEMEINSCHAFTEN. By WALTER STRAUSS. [Frankfurt-am-Main: Vittorio Klostermann. 39 pp. DM. 4.]

THE 1959 INCOME TAX LEGISLATION. By A. S. SILKE. Being a Supplement to "Silke on South African Income Tax" and "The 1958 Income Tax Legislation." [Sweet & Maxwell, Ltd., on behalf of Juta & Co., Ltd., Cape Town. 1959. 44 pp. 16s. 6d.]

THE HISTORY AND DEVELOPMENT OF COMMERCIAL ARBITRATION: RECENT DEVELOPMENTS IN THE SUPERVISORY POWERS OF THE COURTS OVER INFERIOR TRIBUNALS. Lectures by Lord Parker of Waddington. The Hebrew University of Jerusalem Lionel Cohen Lectures. Fifth Series, January. [Magnes Press; London: Oxford University Press. 1959. 59 pp. 8s.]

THE A.I.R. MANUAL. Vol. I, Second edition. [Nagpur: The All India Reporter, Ltd. 1959. 1183 pp.]

UNIVERSITY OF MALAYA LAW REVIEW. Vol. I, No. 1, July 1959. [Singapore: University of Malaya, Department of Law. 174 pp.]

WOODFALL'S LAW OF LANDLORD AND TENANT. Fourth Cumulative Supplement (To April 1, 1959). By JOHN CLARK, B.A. [London: Sweet & Maxwell, Ltd. 8s. 6d.]

30,000 ex-Service men and women are in mental hospitals. A further 74,000 scattered over the country draw neurosis pensions. Thousands of other sufferers carry on as best they can. Many of these need the assistance and understanding which only this voluntary Society, with specialist staff, its own Curative Home and sheltered industry can provide. To all those who turn to the Society for help it offers THE DAWN OF A NEW LIFE.

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The Eighth Edition of

Phipson's MANUAL OF THE LAW OF EVIDENCE

In this edition the arrangement and contents have been drastically revised. Much new material has been added and the older authorities severely pruned. Several sections [notably those on estoppel, burden of proof and similar facts] have been rewritten and a new chapter on the Evidence Act, 1938, added.

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Law Books

Published during Sept. and Oct. 1959

The Annual Practice 1960—Volume 1 By R.F. Burnand, A.S.Diamond, B.G.Burnett-Hall and W.H.Redman £4/10/– (3/–)
As last year only Volume 1 is publishesd in a new edition. A supplement to the 1958 edition of Volume 2 is bound into it.

Berber F.J.—Rivers in International Law (*Library of World Affairs, No. 46*) £2/5/– (2/–)
The development of hydraulic works for the generation of electrictiy, and the increasing use of them for irrigation purposes, have made rivers of far greater importance than they were when they were primarily a means of navigation and a source of fish.

Burt L.—Commander Burt of Scotland Yard 18/– (1/–)
Memoirs which cover Commander Burt's associations with crimes of all types, and particularly with the identification and apprehension of the culprit.

Charlesworth J.—Negligence 3rd Cumulative Suppt. (to Sept. 1, 1959) to the 3rd ed. by R.A.Percy 7/6

Chitty J.—Contracts 5th Cumulative Suppt. (to Sept. 1, 1959) to 21st ed. by F.Maurice Drake 7/6

Chorley (Lord) and **Giles** O.C.—Shipping Law 4th ed. £1/15/– (1/–)
An elementary textbook designed for the use of students embarking on commercial rather than legal careers.

Clarke Hall W. and **Morrison** A.C.L.—Law Relating to Children and Young Persons 2nd Suppt. to 5th ed. by A.C.L.Morrison and L.G. Banwell £1/–/– (1/–)

Clerk J.F. and **Lindsell** W.H.B. on Torts—5th Cumulative Suppt. (to Sept. 1, 1959) to 11th ed. by F.Maurice Drake 7/6

Colombos C.John—The International Law of the Sea 4th ed. £3/–/– (3/–)
Although little more than four years have elapsed since the third edition of this book was published, the additions made to this new edition have been considerable.

Current Legal Problems 1959—Edited by G.W. Keeton and G.Schwarzenberger on behalf of the Faculty of Laws, University College, London £1/17/6 (1/–)
This volume contains together with Professor Sir David Hughes Parry's Presidential Address to the Bentham Club, the public lectures which were delivered in the Faculty of Laws of University College, London, during the Session 1958–59.

European Organisations—An Objective Survey Issued by Political and Economic Planning (PEP) £1/10/– (1/6)
Covers, one by one, the eight major European Organisations which exist today, studying their origin, establishment, procedure and political position.

Friedmann W.—Law in a Changing Society £2/10/– (2/6)
What part has the law played in the social revolution of our time? This book shows the pattern of legal development against the changing social background. There is scarcely a single branch of the law which has not been faced with the necessity of reconsidering old solutions.

Friedmann W.G. and **Pugh** R.C. (Editors)—Legal Aspects of Foreign Investment £7/7/– (3/–)
A study, country by country, of the investment climate in the trading nations of the world. Distinguished authorities contribute chapters on forty individual countries.

International Conciliation—Issues before the fourteenth general assembly September, 1959 No. 524 7/6 (9d.)
International Conciliation is published five times a year, and one of the five is always a special number, such as this, which sets out the issues before the forthcoming General Assembly of the United Nations. The object of the series as a whole is to present analyses of problems in the field of instructional organisation.

Jackson W.Eric—Local Government in England and Wales 3rd ed. 3/6 (9d.)
A description of the history, structure and workings of the local government system and the numerous public services performed by the different types of local council.

Jackson Robert—The Chief The Biography of Gordon Hewart, Lord Chief Justice of England 1922–1940 With a foreword by the Hon. Mr. Justice Cassels £1/1/– (1/–)

James Philip S.—Introduction to English Law 4th ed. 19/– (2/–)
A book designed for first year University students and those studying for professional examinations. This edition follows the same pattern as its successful predecessors, but incorporates all the recent changes and developments in the law.

Lawton C.L.—Enactments and Orders concerning Savings Banks in the United Kingdom, the Channel Islands, and the Isle of Man 2 vols. £3/–/– (4/–)
The author has collected and annotated the relevant enactments and orders, having primarily in mind the practical needs of officials, especially Savings Bank Officers, and has therefore thought it best to omit entirely reference to case law and awards.

McCormick Donald—The Identity of Jack the Ripper 18/– (1/–)
By delving into all the available evidence, and by uncovering a great deal of new material, the author sets out to establish who the murderer really was.

Moriarty Cecil C.H. and **Williams** W.J.—Police Law An Arrangement of Law and Regulations for the Use of Police Officers 15th ed. 15/6 (1/–)
The object of this book is to assist police officers in attaining a working knowledge of the law that they have to enforce. The law dealing with each offence has been assembled under the appropriate heading, and the chapters are arranged in an order suitable for instruction.

Mortlock Bill—Lawyer, Heal Thyself! The Autobiography of a Solicitor 15/– (1/–)
An account, in narrative form, of the cases and private life of a solicitor using the pseudonym of "Bill Mortlock."

Munkman John—Employers Liability at Common Law 4th ed. £2/2/6 (2/–)
The aim of this book is to give the legal profession a reliable and comprehensive textbook on liability for accidents at work. Although it is less than four years since the last edition, the amount of new material which has had to be incorporated is considerable.

Newport Cecil A. and **Plunkett** H.G.S.—Income Tax Law and Practice 1st Suppt (to Sept. 1, 1959) to 28th ed. 5/–

Nicholls A.D. and **Lake** R.E.—Practical Guide to Industrial Derating £1/10/6 (1/–)
A short, practical book on the law and practice of industrial derating, or the relief of some of the burden of rates on industry.

Parker Frank R.—The Powers, Duties and Liabilities of an Election Agent and of a Returning Officer at a Parliamentary Election in England and Wales 6th ed by H.W.Wightwick and H.W.Wollaston £3/10/– (3/–)
This is the standard work for those for whom it was written. It not only sets out what they must and must not do, but makes suggestions as to what they should do and should avoid doing.

Parker Lord—The History and Development of Commercial Arbitration. Recent Developments in the Supervisory Powers of the Courts over Inferior Tribunals Lectures delivered at the Hebrew University of Jerusalem 8/– (6d.)

Parrish Harold—The Local Government Act, 1958 With General Introduction and Annotations Reprinted from Butterworths Annotated Legislation Service £1/7/6 (1/3)

Phipson S.L.—Manual of the Law of Evidence 8th ed. by D.W.Elliott £1/15/– (2/–)
Extensive alterations have been made in this